TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 499.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, ATTORNEY GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR, APPELLANT,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

FILED MAY 26, 1914.

(24238)

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1 *Transcript of record.*

Proceedings of the District Court of the United States for the Western District of Kentucky at a regular term begun and held at the Federal Court Hall, in the city of Louisville, on Monday, October 13th, A. D. 1913.

Present: Honorable Walter Evans, judge of the District Court of the United States for said district.

UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

Be it remembered, that heretofore, to wit, on the 7th day of February, 1914, came the plaintiff by George DuRelle, United States Attorney, and P. J. Farrell, solicitor of Interstate Commerce Commission, and filed in the clerk's office of said court its petition in the above-entitled cause.

Said petition above referred to is as follows:

2 No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT.

Petition.

To the honorable judges of the District Court of the United States for the Sixth Circuit and Western District of Kentucky:

Plaintiff, the United States of America, by James C. McReynolds, Attorney General of the United States, brings this, its petition, against the Louisville and Nashville Railroad Company, the above-named defendant, and thereupon complains and says:

That this suit is instituted in this court by the district attorney of the United States for said district of Kentucky, under the direction of the said Attorney General of the United States, at the request of the Interstate Commerce Commission of the United States;

That said Interstate Commerce Commission is an administrative tribunal, organized and existing under and by virtue of an act entitled "An act to regulate commerce," approved February 4, 1887, as amended, including amendments known as the Hepburn law, approved June 29, 1906, and the Mann-Elkins law, approved June 18, 1910;

3 That said defendant is a corporation, organized and existing under and by virtue of the laws of the State of Kentucky; that

its principal office is located at Louisville, in said State; that it is engaged as a common carrier in the transportation of passengers and property by railroad, in interstate commerce, among the several States and Territories of the United States, including the State of Kentucky in said district, and that it is subject to said act to regulate commerce and amendments thereof and supplements thereto.

That by section 20 of said act, as amended, it is provided: That said Interstate Commerce Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to said act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys; that said commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to said act; that it shall be unlawful for such carriers to keep any accounts, records, or memoranda other than those prescribed or approved by said commission; that said commission may employ special agents, or examiners, who shall have authority under the order of said commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers; that in cases of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by said commission, or to submit such accounts, records, and memoranda as are kept to the inspection of said commission, or any of its authorized agents or examiners, such carrier shall forfeit to the United States the sum of five hundred dollars for each such offense, and for each and every day of the continuance of such offense; that any person who shall willfully make any false entry in the accounts of any book of accounts, or in any record or memoranda kept by such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such ac-
4 count, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to such carrier's business, or shall keep any accounts, records, or memoranda other than those prescribed or approved by said commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment; that the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of said commission, alleging a failure to comply with or a violation of any of the provisions of said act, or of any amendment thereof, or supplement thereto, by any common carrier subject to said act, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said act, and of the amendments thereof and supplements thereto, or any of them, and that, for the purpose of carrying out and giving effect to the provi-

sions of said act and said amendments and supplements, said commission is authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

That by section 12 of said act, as amended, said commission is authorized and required: To inquire into the management of the business of all common carriers subject to the provisions of said act, to keep itself informed as to the manner and method in which said business is conducted; to obtain from such common carriers full and complete information necessary to enable said commission to perform the duties and carry out the objects for which it was created, and to execute and enforce the provisions of said act.

That by said section 12 it is provided that, upon the request of said commission, it shall be the duty of any district attorney of the United States to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of said act and for the punishment of all violations thereof;

That on the sixth day of November, 1913, a resolution was considered by unanimous consent in the Senate of the United States, and agreed to by said Senate, in words and figures as follows, to wit:

"RESOLUTION.

Resolved, That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable—

First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and

what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad, and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad, or any of its subsidiaries, or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing or tending to show, the further relations between the Louisville and Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing, or tending to show, (a) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and, (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga and Saint Louis Railway by which the former uses the tracks of the said Western and Atlantic Railway restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing, or tending to show, whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company, or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials, or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads."

That prior to the times hereinafter mentioned, said commission, for the purpose of enabling it to perform the duties imposed upon it by said act as aforesaid, duly appointed two special agents and examiners, namely, Will H. Carleton and Paul H. Lawrence, and duly authorized them to inspect and examine the accounts, records, and memoranda of said defendant, and said Carleton and Lawrence continuously since said appointment have been, and still are, duly appointed and authorized agents and examiners of said commission, with authority as aforesaid;

That heretofore, to wit, on the 4th day of February, 1914, the said commission, by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant, and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant prior to August 28, 1906, and the said defendant and said Mapother, vice president as aforesaid, and said other officers and agents of defendant, failed and refused to comply with the provisions of said act to

regulate commerce, and violated the provisions of said act, and failed and refused to give, either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant made prior to said August 28, 1906;

And that heretofore, to wit, on February 4, 1914, said commission, by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant, and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant on and subsequent to said August 28, 1906, including the correspondence received by said defendant on and subsequent to said date and copies of the correspondence sent out by said defendant on and subsequent to said date, and also the indexes pertaining to said correspondence and copies of correspondence, and that said defendant and said Mapother, vice president as aforesaid, and said other officers of said defendant, failed and refused to comply with the provisions of said act to regulate commerce and violated the provisions of said act, and failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant; that is to say, that said defendant and its said officers and agents failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said correspondence received by said defendant on and subsequent to said August 28, 1906, or the copies of correspondence sent out by said defendant on and subsequent to said date, or the indexes kept with respect to said outgoing and incoming correspondence by said defendant, and said defendant and its said officers and agents failed and refused to give, either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine other accounts, records, and memoranda of said defendant made on and subsequent to said August 28, 1906.

That in pursuance of said commission's duty under the law, and in obedience to said resolution of the Senate hereinbefore set out, and to enable said commission to perform the functions for which it was created, it became and was the duty of said commission to obtain access to, and to examine, by and through its special agents and examiners as aforesaid, all of said accounts, records, and memoranda, including said correspondence, copies of correspondence, and indexes thereto, and it became and was the duty of said defendant and its officers and agents to give access to said commission and its agents and examiners to said accounts, records, memoranda, correspondence, copies of correspondence and indexes, and to give to said commission and said agents and examiners opportunity to ex-

amine and inspect said accounts, records, memoranda, correspondence, copies, and indexes.

Wherefore, plaintiff prays the court to issue a writ of mandamus, commanding said Louisville and Nashville Railroad Company, common carrier as aforesaid, to comply with said provisions of said acts of Congress, and to give access to the accounts, records, and memoranda of said defendant and the said correspondence, copies of correspondence, and indexes thereto, and to afford opportunity to examine the same to said commission and its said agents and examiners, and to give such access to and opportunity to examine the said accounts, records, and memoranda made and kept by and for
11 said defendant both before, on, and subsequent to August 28, 1906, including correspondence, copies of correspondence, and indexes thereto, and other indexes to said accounts, records, and memoranda, and plaintiff prays for all proper relief.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky, Louisville, Ky.
P. J. FARRELL,
Solicitor of Interstate Commerce Commission, Washington, D. C.
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
Western District of Kentucky, Set:

George DuRelle states that he is attorney of the plaintiff, United States of America, and that the statements contained in the foregoing petition are true.

GEORGE DURELLE.

Subscribed and sworn to before me by George DuRelle this 7th day of February, 1914.

A. G. RONALD, *Clerk.*

12 And on the 17th day of March, 1914, the defendant, Louisville and Nashville Railroad Company, filed in said cause its answer, in words and figures as follows:

District Court of the United States, Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT.

Answer.

Defendant, Louisville & Nashville Railroad Company, for answer to the petition herein says:

PARAGRAPH I.

As to the requirements of the act to regulate commerce, and other statutes referred to in the petition, and as to the rights and duties

of persons thereunder, defendant submits that these are questions of law, and that defendant is not required to admit or deny plaintiff's allegations concerning the same.

As to the general allegations of the petition, to the effect that defendant has failed and refused to comply with the provisions of the act to regulate commerce and has violated the provisions thereof, defendant submits that said allegations are too vague and general to require or permit of any response from it.

13 Defendant denies that on February 4, 1914, or at any time prior to the institution of this action, it failed or refused to give, either to the Interstate Commerce Commission, or to Carleton, its agent and examiner, access to or opportunity to examine any accounts, records, of memoranda of defendant made on or since August 28, 1906.

Defendant says, as a matter of grace, it did, prior to the filing of this suit, give said examiners access to correspondence, other than privileged communications, but after this suit it did refuse, and now refuses, to give either to said commission, or to said Carleton, access to or opportunity to examine correspondence received by defendant before, on, or subsequent to August 28th, 1906, or copies of correspondence sent out by defendant before, on, or subsequent to said date, or the indexes kept with respect to said outgoing and incoming correspondence by defendant (except correspondence as to passes issued since January 1, 1911, as set forth in paragraph four hereof).

Defendant says its said correspondence contains private and confidential communications between its various officers and agents regarding various matters that do not in any way pertain to the provisions of the act to regulate commerce and the acts amendatory thereof, nor to any other act of Congress, the provisions of which it is made the duty of the Interstate Commerce Commission to enforce. Said correspondence contains communications of a private and confidential nature between the president of defendant and the heads of the various departments of defendant's organization, relative to its internal affairs; as to its proposed constructions and extensions in the future; and as to its policies with competing and rival roads; as to its relations with labor organizations represented in its operating department; and as to a variety of other subjects of a private and confidential nature, and that do not relate to the provisions of the act to regulate commerce and acts amendatory thereof, nor to any other act of Congress as to the enforcement of which any

14 duty has been imposed upon the Interstate Commerce Commission. And said correspondence also contains confidential, private, and privileged communications between defendant and its attorneys at law.

Section 20 of the act to regulate commerce provides that the commission may, in its discretion, prescribe the form of any and all accounts, records, and memoranda to be kept by carriers subject to the act, including the accounts, records, and memoranda of the move-

ment of traffic as well as the receipts and expenditures of moneys, and that the commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to said act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, and it may employ special agents or examiners, who shall have authority under the order of the commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers.

Defendant states that under said provision of the act the Interstate Commerce Commission has prescribed a uniform system of railway accounting, including the following order, to wit:

1. Classification of operating revenues, effective July 1, 1907; supplemented by an order effective July 1, 1908, known as the "Supplement to the first issue of the classification of operating revenues."

2. First revised issue of the classification of expenditures for road and equipment, made effective July 1, 1907, to which a supplement was issued by an order effective July 1, 1908, known as the "Supplement to the first revised issue of the classification of expenditures for road and equipment."

3. Third revised issue of the classification of operating expenses, made effective July 1, 1907, to which a supplement was issued, made effective July 1, 1908.

15 4. Classification of revenues and expenses for outside operations, made effective July 1, 1908.

5. First issue of the classification of locomotive miles, car-miles, and train-miles, made effective July 1, 1907.

6. Form of general balance-sheet statement, made effective June 15, 1910.

7. Classification of expenditures for additions and betterments, made effective July 1, 1910.

8. Form of income and profit and loss statement for the use of carriers, made effective July 1, 1912.

Defendant therefore states that under section 20 of the interstate commerce act, the commission has prescribed in detail a general accounting system for all carriers subject to the provisions of said act. Defendant has complied with all of said forms that have been prescribed by said commission, and the commission and its examiners have had full and complete access to same.

Said commission has never pretended to prescribe any forms for correspondence between the officials of the various departments of defendant, nor for correspondence between such officials and its patrons and the general public, and obviously forms for correspondence could not be prescribed, and any attempt to prescribe such forms would be manifestly absurd.

16 PARAGRAPH II.

The defendant further states that if the act to regulate commerce, as amended, properly construed, is intended to gra[illegible] to the

said commission, its examiners or agents, the right of access to, and the right to examine or inspect at will, any or all "accounts, records, and memoranda," and all correspondence received, and all copies of correspondence sent out by the defendant or its officials in the manner and as set out and claimed in the petition herein, then the exercise of such alleged right, in that respect, would amount to and operate as an unreasonable search and seizure of the private papers of the defendant, and the provisions of said act, thus construed, would, to that extent, be, and they are, in violation of the provisions of the fourth amendment to the Constitution of the United States, which are pleaded are relied on by defendant in bar of the petition and the relief prayed therein.

PARAGRAPH III.

The order of the Interstate Commerce Commission, dated November 10, 1913, by and under which the investigation referred to in the petition herein was commenced and is being conducted by said commission, was made in Investigation No. 6319, under Resolution No. 153 of the Senate of the United States, adopted November 6, 1913, which order (a copy of which was duly served upon this defendant by said commission at the beginning of said investigation) is in words and figures as follows, to wit:

17 ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of November, A. D. 1913.

EDGAR E. CLARK,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
JAMES S. HARLAN,
CHARLES C. MCCHORD,
BALTHASAR H. MEYER,
JOHN H. MARBLE,
Commissioners.

No. 6310.

In re financial relations, rates, and practice of the Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and other carriers.

The United States Senate having, by Resolution No. 153, adopted November 6, 1913, directed the Interstate Commerce Commission to investigate, take proof, and report to the Senate as soon as practicable—

First. What amount of stocks, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

18 Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad, and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad, or any of its subsidiaries or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing, or tending to show, the further relation between the Louisville and Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing, or tending to show, (a) the relations between the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Tennessee

19 Midland Railroad; the Tennessee, Paducah, and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga and Saint Louis Railway, by which the former uses the tracks of the said Western and Atlantic Railway, restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing, or tending to show, whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad termi-

nals or terminal companies, steamboats, and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority
20 of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Nashville and Decatur Railroad; and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free annual passes; (b) the number of free trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued upon each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads;

It is ordered, that a proceeding of inquiry and investigation be, and the same is, hereby instituted into and concerning the several matters and things set forth and referred to in the said resolution.

It is further ordered, that this proceeding be set for hearing at such times and places, and that such persons be required to appear and testify, or to produce books, documents, and papers, as the commission may hereafter direct; and that the investigation be carried on in the meantime by such other means and methods
21 as may be deemed appropriate.

And it is further ordered, that a copy of this order be served upon each of the following-named railroad companies and

upon any other companies which may hereafter be designated by the commission:

Nashville, Chattanooga & St. Louis Railway;
Louisville & Nashville Railroad Company;
Nashville & Decatur Railroad Company;
Lewisburg & Northern Railroad;
Tennessee Midland Railroad Company;
Tennessee, Paducah & Alabama Railroad;
Western & Atlantic Railroad; and
Atlantic Coast Line Railroad Company.

The defendant submits that the subject matter of neither of the first twelve paragraphs of said resolution is within the powers or jurisdiction of the Interstate Commerce Commission, nor within the scope and purposes of the act to regulate commerce as amended, nor can the same be made the subject of a complaint under the provisions of said act before, or of an investigation and report by, said commission, or be made the basis or grounds for the examination or inspection by said commission, its examiners or agents, of any of the "accounts, records, or memoranda," correspondence, copies of correspondence kept by the defendant, either on, before, or since August 28, 1906; nor is the commission, or any of its examiners or agents, entitled to access to any of the "accounts, records, or memoranda," correspondence, copies of correspondence, or the indexes thereto, or the production of any part thereof, in so far as the subject-matter of either of said twelve paragraphs of said resolution is concerned.

22 PARAGRAPH IV.

The defendant further states that so far as the subject matter of the thirteenth paragraph of said Senate resolution, which relates to free passes issued since January 1, 1911, by the defendant to public officials and members of legislative bodies is concerned, the defendant has not heretofore refused, but permitted, the said commission, its examiners, and agents, on their request, to have access to and to examine and inspect all "accounts, records, and memoranda" relating to such passes, whether interstate or intrastate, and also all correspondence relating to such passes (although defendant claims that the commission had no legal right to examine any of said correspondence, nor to examine any intrastate passases, or any accounts, records, and memoranda pertaining thereto).

Wherefore defendant prays to be hence dismissed with its costs.

H. L. Stone,
Helm Bruce,
E. S. Jouett,
W. A. Colston,
Attorneys for Defendant.

STATE OF KENTUCKY,
County of Jefferson, Sct:

Affiant, M. H. Smith, states that he is the president of defendant, the Louisville & Nashville Railroad Company, and that the statements of the foregoing answer are true, as he believes.

M. H. SMITH.

Subscribed and sworn to before me by M. H. Smith this 17th day of March, 1914. My commission expires January 30, 1916.

GEO. R. EWALD,
Notary Public, Jefferson County, Ky.

23 And on March 19th, 1914, the plaintiff filed herein its motion for a mandamus, in words and figures as follows:

No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McReynolds, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

The plaintiff moves the court to issue a writ of mandamus commanding said defendant, said Louisville and Nashville Railroad Company, to comply with the provisions of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory and supplementary to said act, and to give to the Interstate Commerce Commission of the United States and to the agents and examiners of said commission, and to Will H. Carleton, agent and examiner of said commission, access to and opportunity to inspect and examine the accounts, records, and memoranda of said defendant, including the correspondence, copies of correspondence, and indexes thereto, and other indexes to said accounts, records, and memoranda made and kept by and for said defendant both before, on, and subsequent to August 28, 1906.

GEORGE DURELLE,
P. J. FARRELL,
Counsel for Plaintiff.

24 And on another day of said term, to wit, on March 23rd, 1914, the following proceedings were had:

No. 164.

In the District Court of the United States for the Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

This cause coming on for hearing on the plaintiff's motion, filed herein March 19th, 1914, for a mandamus in accordance with the prayer of its petition, the plaintiff temporarily withdrew said motion and introduced Will H. Carleton as a witness on its behalf, who was duly sworn and whose testimony was heard. The plaintiff thereupon renewed the motion for a mandamus, entered on March 19th, 1914, and the testimony offered by the plaintiff and defendant having been heard and the cause having been argued by George Du Relle, district attorney, and P. J. Farrell on behalf of the plaintiff, and by Helm Bruce and E. S. Jouett on behalf of the defendant, and the court, not being sufficiently advised on said motion, takes time to consider same.

25 And on another day of said term, to wit, March 25th, 1914, the following proceedings were had:

164.

District Court of the United States, Western District of Kentucky.

UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, Attorney General, plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, defendant.

Judgment.

This action having been heard and submitted in chief upon the pleadings and evidence herein and the arguments of counsel, and the court being sufficiently advised, delivered a written opinion which was filed, and pursuant thereto it is now considered, ordered, and adjudged by the court that plaintiff's motion for a mandamus be, and it is hereby, denied and that its petition herein be, and it is hereby, dismissed without prejudice; to all of which plaintiff excepts.

The opinion above referred to is as follows:

26 #164.

United States District Court, Western District of Kentucky.

UNITED STATES, BY ITS ATTORNEY GENERAL,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Opinion.

The act to regulate commerce, after providing (section 1) that it shall apply to any common carrier or carriers engaged in the transportation of passengers or property from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States, or to any adjacent foreign country, but that its provisions should not apply to the transportation of passengers or property wholly within any State, provides that all charges for such transportation shall be reasonable and just, that all classifications of property for transportation shall be just and reasonable, and (sections 2 and 3) that unjust discrimination shall be unlawful, and that no undue or unreasonable preference shall be given to any shipper, and (section 5) that it shall be unlawful to pool freights, and the Interstate Commerce Commission is given authority to determine questions of competition or possible competition. By section 6 it is provided that certain schedules of rates, fares, and charges shall be filed and established, and that due notice thereof shall be given. Section 6 also provides that every common carrier subject to the act shall file with the Interstate Commerce Commission copies of all contracts, agreements, or arrangements with other common carriers of any arrangements affected by
27 the act, and also provides that no common carrier shall engage in such transportation unless it files and publishes such schedules of rates. The Interstate Commerce Commission established by the act is given wide and extensive powers, among which (section 12) is the authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and the commission is required to keep itself informed as to the manner and method in which such business is conducted, with the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created, and, upon the request of the commission, it is made the duty of the district attorney of the United States to whom it may apply to institute in the proper court necessary proceedings for the enforcement of all the provisions of this act for the punishment of all violations thereof. By section 20 the commission is authorized to require from all carriers subject

to the act annual reports, and it may prescribe the method of making them, and such annual reports are required to show in detail its capital stock and many other items specified in that section. This section further provides that the commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of the act, including the accounts, records, and memoranda of the movement of traffic as well as receipts and expenditures of money. The commission is authorized at all times to have access to all accounts, records, and memoranda kept by carriers subject to the act, and it is provided that it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, and the commission is authorized to employ special agents or examiners who shall have authority under the order of the commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. The section prescribes
28 penalties for the failure on the part of the carrier to keep such accounts, records, and memoranda on such books as may be prescribed by the commission, or for a refusal to submit such accounts, records, or memoranda as are kept to the inspection of the commission or any of its authorized agents or examiners. This section contains a clause which reads thus:

"That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of said act to regulate commerce or of any act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus, commanding such common carrier to comply with the provisions of said acts or any of them."

On February 7th, 1914, the United States, by its Attorney General, filed in this court a petition in which, among other things, it is alleged:

"That by section 12 of said act, as amended, said commission is authorized and required: To inquire into the management of the business of all common carriers subject to the provisions of said act, to keep itself informed as to the manner and method in which said business is conducted; to obtain from such common carriers full and complete information necessary to enable said commission to perform the duties and carry out the objects for which it was created; and to execute and enforce the provisions of said act.

"That by said section 12 it is provided that upon the request of said commission it shall be the duty of any district attorney of the United States to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions
29 of said act and for the punishment of all violations thereof;

"That on the sixth day of November, 1913, a resolution was considered, by unanimous consent in the Senate of the United States, and agreed to by said Senate, in words and figures as follows, to wit:

"RESOLUTION.

"Resolved, That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable—

"First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

"Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

"Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

"Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

"Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad or any of its subsidiaries or holding companies;

"Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

"Seventh. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

"Eighth. Any fact or facts showing, or tending to show, (a) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both

of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville, and the Nashville, Chattanooga and Saint Louis Railroad, by which the former uses the tracks of the said Western and Atlantic Railway, restrict competition, restrain trade, and determine and fix rates;

"Ninth. Any fact or facts showing, or tending to show, whether the ownership of the Louisville and Nashville Railroad and
31 the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats, and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

"Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement:

"Eleventh. What amount of stock, if any, the Atlantic Coast Line, or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates:

"Twelfth. What amount, if any, the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Nashville and Decatur Railroad; and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

"Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of
32 free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads.

"That prior to the times hereinafter mentioned said commission, for the purpose of enabling it to perform the duties imposed upon it by said act as aforesaid, duly appointed two special agents and examiners, namely, Will H. Carleton and Paul H. Lawrence, and duly authorized them to inspect and examine the accounts, records, and memoranda of said defendant, and said Carleton and Lawrence continuously since said appointment have been, and still are, duly appointed and authorized agents and examiners of said commission, with authority as aforesaid;

"That heretofore, to wit, on the 4th day of February, 1914, the said commission, by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant, and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant, for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant prior to August 28, 1906, and the said defendant and said Mapother, vice president as aforesaid, and said other officers and agents of defendant failed and refused to comply with the provisions of said act to regulate commerce, and violated the provisions of said act, and failed and refused to give either to said commission or to said Carleton, agent and examiner aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant made prior to said August 28, 1906;

33 "And that heretofore, to wit, on February 4, 1914, said commission, by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant on and subsequent to said August 28, 1906, including the correspondence received by said defendant on and subsequent to said date and copies of the correspondence sent out by said defendant on and subsequent to said date, and also the indexes pertaining to said correspondence and copies of correspondence, and that said defendant and said Mapother, vice president as aforesaid, and said other officers of said defendant failed and refused to comply with the provisions of said act to regulate commerce, and violated the provisions of said act, and failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant; that is to say, that said defendant and its said officers and agents failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said correspondence received by said defendant on and subsequent to said August 28, 1906, or the copies of correspondence

sent out by said defendant on and subsequent to said date, or the indexes kept with respect to said outgoing and incoming correspondence by said defendant, and said defendant and its said officers and agents failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine other accounts, records, and memoranda of said defendant made on and subsequent to said August 28, 1906.

34 "That in pursuance of said commission's duty under the law, and in obedience to said resolution of the Senate hereinbefore set out, and to enable said commission to perform the functions for which it was created, it became and was the duty of said commission to obtain access to and to examine by and through its special agents and examiners as aforesaid, all of said accounts, records, and memoranda, including said correspondence, copies of correspondence and indexes thereto, and it became and was the duty of said defendant and its officers and agents to give access to said commission and its agents and examiners to said accounts, records, memoranda, correspondence, copies of correspondence and indexes, and to give to said commission and said agents and examiners opportunity to examine and inspect said accounts, records, memoranda, correspondence, copies, and indexes.

"Wherefore, plaintiff prays the court to issue a write of mandamus commanding said Louisville and Nashville Railroad Company, common carrier as aforesaid, to comply with said provisions of said acts of Congress, and to give access to the accounts, records, and memoranda of said defendant and the said correspondence, copies of correspondence and indexes thereto, and to afford opportunity to examine the same to said commission and its said agents and examiners, and to give such access to and opportunity to examine the said accounts, records, and memoranda made and kept by and for said defendant both before, on, and subsequent to August 28, 1906, including correspondence, copies of correspondence, and indexes thereto, and other indexes to said accounts, records, and memoranda, and plaintiff prays for all proper relief."

35 The defendant's answer contains four separate paragraphs, each of which states a separate matter of defense. Their substance may, we think, be succinctly, and for the present purpose sufficiently, stated as follows:

1st. The first paragraph, after certain denials, states facts upon which the defendant insists that it had exhibited to the agent of the Interstate Commerce Commission all the accounts, records, and memoranda, and other papers which the law required it to show, and had withheld none which it was its duty to exhibit. It avers that it was not required to do so, and for that and other reasons it did not exhibit various papers described in general terms which the law did not require it to show the examiner, many of which were privileged communications between the various departments of its official work, including those between the defendant and its attorneys, but which had no relation to anything coming within the act.

2nd. The defendant, in paragraph two of its answer, pleads exemption under the fourth of the articles of amendments to the Constitution of the United States from the searches sought to be made by the examiner upon the ground that those searches are unreasonable.

3rd. The third paragraph sets up the order of the Interstate Commerce Commission made on November 10th, 1913, and which was served on defendant on November 13th, and which order directed certain steps to be taken in order to carry into effect the resolution passed by the Senate and set forth in plaintiff's petition. This order, it is claimed, has not been followed by the examiner in this instance, and,

4th. The answer endeavors to show that the defendant had fully complied with the demand of the commission and its examiner in respect to the free passes it had issued since January 1, 1911, by giving to the examiner a full exhibition of all the facts in respect thereto.

36 In the view we feel compelled to take of the case, we think it unnecessary to dwell upon the defense set up in paragraph 2 of the answer, in respect to the fourth amendment to the Constitution.

With equal brevity may we dispose of the fourth defense, because it is admitted at the bar that so far as the inquiry respecting the free passes is concerned, full and satisfactory information has been given to the examiner by the defendant.

This leaves for consideration only the defense set up in the first and that set up in the third paragraphs of the answer.

We shall state with brevity our views upon each of these defenses, circumstances not favoring an elaborate discussion of them, even if that were necessary or desirable. Indeed, the third paragraph may be easily disposed of:

In the case of Hein vs. The Levee Commissioners, 19 Wall., at page 660, the Supreme Court, speaking through Mr. Justice Miller, said:

"Mandamus is essentially and exclusively a common-law remedy and is unknown to the equity practice. But if this were otherwise, it is the well-settled doctrine of this court that the circuit courts can not use the writ of mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights when jurisdiction has been already acquired for other purposes."

This is the general rule, but the act to regulate commerce gives the court jurisdiction and power to issue writs of mandamus in certain cases for the enforcement of the act, but in no way can it be construed to confer upon the court power to enforce by that writ a resolution of the Senate alone, such resolution being no part of the act and not being a law of the United States. This was so obvious that the learned district attorney frankly admitted that the Senate resolution could not be enforced in that manner, and in open court dis-

37 claimed any purpose to seek relief upon that ground.

In these circumstances we may lay to one side the Senate resolution as such, though if there can be found in it anything which also comes within the provisions of the act to regulate commerce, the relief sought in this case might be grantable, even if the Senate resolution also contained it. A careful examination of the plaintiff's petition, the act to regulate commerce, and the Senate resolution has resulted in the conclusion that, except in the 13th clause of the Senate resolution, which relates to the inquiry as to free passes issued, that resolution, under no admissible interpretation, relates to interstate commerce as regulated by the act. It relates possibly to other legislation, such as the anti-trust act, but not to the act regulating commerce between the States. This being so, that clause of the act to regulate commerce which gives the court power to issue writs of mandamus does not embrace a case outside the latter act.

As in the Harriman case, 211 U. S., 417, et seq., it is claimed here that the general language of the act confers unlimited authority upon the Interstate Commerce Commission and its agents, whether or not the court can see how what is demanded affects interstate commerce. In the opinion in that case Mr. Justice Holmes gave a graphic description of the broad construction insisted upon by the commission, and indeed it must be confessed that much support to these claims has been given by the Supreme Court in other cases, and by Congress. We think it not unlikely that there are few limits which can safely be fixed by the lower Federal courts upon the operation of the clause of the act bestowing power upon the commission. Nevertheless, we think it clear that the Senate resolution, not being a law, can not bring this case within section 20 of the act to regulate commerce in respect to the writ of mandamus. Whatever the Senate itself might do in other directions, in order to obtain the in-
38 formation it desires, the courts have no authority to aid its resolution by issuing a writ of mandamus. This being so, we shall confine our examination to the question, whether, when all that relates to the Senate resolution is taken out of the plaintiff's petition anything sufficiently appears to entitle it to the relief it seeks. Several propositions may be considered as bearing upon the general result, and each will be briefly noticed:

(a) The principle that communications between an individual and his counsel are privileged has been so often and so long held that it will take a court higher than this to upset so old, so necessary, and so wise a principle. That this principle is imbedded in our jurisprudence is clear from cases like Connecticut Mutual Life Insurance Co. vs. Schaefer, 94 U. S., 458, and many others which might be cited. We need not further elaborate this proposition, but conclude that the 4th amendment to the Constitution and general principles of sound jurisprudence should prevent the issuing of any writ of mandamus which would require the production of papers or statements within the purview of the rule we have stated. The

intention of Congress to abrogate the rule has not been made manifest, and will not be presumed.

(b) The question whether the provisions of the so-called Hepburn Act, which authorizes the commission to require the production of accounts, records, and memoranda, should so far have a retrospective effect as to authorize the commission to enforce such production if the accounts, records, and memoranda were made previous to August 28, 1906, when the Hepburn Act went into effect, was argued with great ability. The general rule is that statutes are presumed to be prospective in operation, and the courts will refuse to give a retrospective effect to them unless the intention to the contrary is so clear and positive as by no reasonable possibility to admit of any other construction. But whether this general principle should be applied here admits of enough doubt to incline us to pass the
39 question by, inasmuch as its definite settlement is not essential to the decision of the case.

(c) But granting a writ of mandamus is always matter of sound discretion. To say the least, there certainly is grave doubt whether the court can compel the defendant to exhibit those papers to the commission which are ordinarily held to be privileged, such as communications between client and attorney.

There is grave doubt, also, whether a proper interpretation of the Hepburn Act should so far give it a retrospective operation at this late day as to authorize the court to compel the defendant to produce papers which had their origin before that act went into effect in August, 1906, and with all the allegations of plaintiff's petition in reference to the Senate's resolution elimited, as we think should be and has been done, we have concluded that the writ of mandamus can not be properly or discreetly based upon the extremely vague allegations which will then alone remain in the plaintiff's petition and which insist upon the production of all the papers as to which we have indicated the doubts just expressed.

It is difficult in these circumstances to see how there could be any such definite and distinct directions to the defendant as would guard its rights while at the same time enforcing the performance of its duties. We think the court, in its discretion, should not grant the writ unless it can clearly and definitely define the duty it imposes upon the person it commands. This the court can not do under the vague and general allegations of the petition. All these reasons combined have lead us to the conclusion that the motion of the plaintiff should be denied.

We think, also, that the action should be dismissed. As already indicated, the allegations of plaintiff's petition are too meager and too vague, after everything in the case respecting the
40 Senate resolution has been eliminated, to fairly afford a basis of any specific relief. If that pleading had stated with clearness, though necessarily in general terms, the exact records or papers of the defendant an examination of which had been demanded and refused, and so that the court might see from plaintiff's pleading or

from the testimony what portions of them might (if the descriptions were accurate) be privileged and what not, or what part of them might be within the act and what not, we might be able to direct in a writ of mandamus what parts of such records should be exhibited to the examiner and what not. But the meager, vague, and extremely general statements now remaining in the pleading, even when considered in connection with the testimony, do not disclose in adequate form information sufficient to enable the court to act in determining the questions of importance to which it is asked to respond. To grant the writ in the broad and general, not to say unlimited, terms asked for might, indeed, uphold plaintiff's contention as to the powers of the Interstate Commerce Commission, but might be perilously near the unreasonable search forbidden by the Constitution. If the plaintiff had propounded claims to relief in such separately stated propositions as were based upon a general but exact description of the class of records which had been demanded, but which the examiner had failed to obtain, we might then be able to discriminate and grant such parts of the relief sought as appeared to be proper, while denying the rest. But where the plaintiff asks an unlimited roving commission for the examiners, without making such specific averments as will enable the court to discriminate in its judgment between what may be properly granted and what not, we think no title to any relief is made clear by the plaintiff, who must adequately and sufficiently show its claim to be well founded, at least in part. Here, such confusion exists between what might be good and what bad that the court does not think it discreet
41 to grant the writ prayed for as the case is now presented.

Upon reasons such as we have indicated, while the action must be dismissed, it should be without prejudice, and the judgment will so provide. One may be prepared accordingly.

WALTER EVANS, *Judge.*

MARCH 25, 1914.

42 And on another day of said term, to wit, on the 18th day of April, 1914, the following proceedings were had:

No. 164.

In the District Court of the United States for the Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, the Attorney General of the United States, plaintiff.
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

This day appeared The United States of America, plaintiff, by George DuRelle, attorney of the United States, and Joseph W.

Folk, chief counsel for the Interstate Commerce Commission, and tendered to the court a bill of exceptions, which having been approved and signed by the court is now ordered filed. Plaintiff tendered its assignment of errors, which is now ordered filed, and also a petition for a writ of error and a petition for an appeal, which are hereby filed, and it is ordered that said petition for appeal and said writ of error be, and the same are hereby, allowed to be reviewed in the Supreme Court of the United States.

43 The bill of exceptions above referred to is as follows:

No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

UNITED STATES OF AMERICA, BY JAMES C. McReynolds, Attorney General, plaintiff.
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company, defendant.

Bill of exceptions.

Be it remembered that on the 23rd day of March, 1914, the above-entitled cause came on for trial before the above-styled court, the honorable Walter Evans, district judge, presiding.

The plaintiff appeared by George DuRelle, United States Attorney, and P. J. Farrell, solicitor of the Interstate Commerce Comsion, and the defendant by Henry L. Stone, Helm Bruce, and E. S. Jouett, its counsel, and the following proceedings were had:

WILL H. CARLETON, called as a witness for the plaintiff, being duly sworn and examined by George DuRelle, testified as follows:

Q. What is your name?

A. Will H. Carleton.

Q. What is your occupation?

A. Examiner for the Interstate Commerce Commission.

Q. How long have you been so occupied?

A. Since May 10th, 1909.

Q. What is the exact title of your office?

44 A. The exact title is Special Agent or Examiner.

Q. Of the Interstate Commerce Commission?

A. Of the Interstate Commerce Commission.

Q. What is your authority as such special agent or examiner?

The COURT. Is that fixed by statute or by instructions from the Interstate Commerce Commission?

Judge DURELLE. A little of both.

Mr. BRUCE. So far as fixed by the Interstate Commerce Commission, I object to the witness stating it. He must produce the record.

The COURT. Yes; I take it it is largely dependent upon the statute, and upon that no proof is necessary.

Judge DuRelle. No; no proof is necessary, and the instructions of the commission can not go further than the statutes, but I wanted to show that they went that far.

The Court. Suppose we assume that they did go that far.

Judge DuRelle. I would like in this case for the witness to produce the exact authority from the commission that he has.

The Court. I rather think that the point is well taken so far. I think he should produce the authority. I think you may fairly assume that the Interstate Commerce Commission had given to one of its general agents the right to exercise all of the authority the law conferred upon him. If, however, there were any special instructions apart from that, the other side should have them. I think we should have a copy of what special instructions were given, but I don't think the appointment of this special agent would carry with it the authority to do anything that the statute authorized, and the only question is the details or how he attempted to carry out that authority.

Judge DuRelle. Very well, I will produce and have read in evidence the authorization. We have the original authorization of this witness.

45 The Court. Just read that.

Q. Read that in evidence.

Mr. Bruce. I would like to see it first.

The paper in question was handed to the counsel for the defendant, who examined it and handed it back to the witness, who then read.

A. United States of America, Interstate Commerce Commission, Washington. I, Edward E. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that, under the authority conferred by law, the Interstate Commerce Commission has duly appointed Will H. Carleton a special agent or examiner, with authority to inspect and examine any and all accounts, records, and memoranda kept by carriers subject to the act to regulate commerce, and his authority will be respected accordingly.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said commission at its office in Washington, District of Columbia, this 10th day of May, 1909.

(Signed) Edward E. Moseley,
Sec'y Interstate Commerce Commission.

Certificate No. 49, and with the seal of the commission thereon.

Q. Has that authority ever been revoked?

A. It has not.

Q. Under that authority did you, as special agent or examiner of the commission, make, or attempt to make, an examination of the accounts, records, and memoranda of the Louisville & Nashville Railroad Company in this city?

A. I did.

Q. Did you have any other authority from that commission than that?

A. No, sir.

Q. Were you or not refused access to any accounts, records,
46 or memoranda of the Louisville & Nashville Railroad Company?

A. Yes, sir.

Q. On what dates?

A. Various.

The COURT. Give them, approximately.

Q. Was such refusal——

The COURT. I have not heard him give the dates. I want him to give the dates as near as he can.

A. Approximately. January 23d was the date of the first refusal.

Q. Were you refused access to any such accounts, records, or memoranda on February 4th?

A. Yes, sir.

Q. Were you refused access to any specific records for which you asked?

The COURT. That is a very important question, as the case will probably bring out as to what records, accounts, or memoranda he was refused access to. I think we must get down to specific facts, in order that the court may understand and differentiate certain things that will be spoken of further along.

Q. Before we come to that I will ask another question: Was the refusal of the Louisville & Nashville Railroad Company put in writing?

A. It was.

Q. Have you that written refusal?

A. I have.

Q. Will you please produce it?

(The witness did so.)

Q. By whom was that refusal made?

A. W. L. Mapother, the first vice president of the Louisville & Nashville Railroad Company.

47 Q. To whom was that addressed?

A. To me.

Judge DuRELLE. I offer that in evidence.

The COURT. Read that in full. I want to hear it.

A. Do you care for the heading?

The COURT. All of it.

WITNESS. The printed head?

The COURT. Just read it.

A. LOUISVILLE & NASHVILLE RAILROAD COMPANY,
FIRST VICE PRESIDENT'S OFFICE, LOUISVILLE, KY.,
W. L. MAPOTHER, FIRST VICE PRESIDENT,
February 4, 1914.

Mr. WILL H. CARLETON,
Examiner Interstate Commerce Commission,
Hermitage Hotel, City.

DEAR SIR: In view of our several discussions concerning the extent of the powers of yourself and assistants in the matter of examining

the correspondence files and papers of the L. & N. R. R. Co., I deem it desirable that I clearly and definitely state the company's position, in order that you may govern yourself accordingly.

It is the opinion of our general counsel, (1) that the extraordinary inquisitorial powers given to the commission, its agents, and examiners, by section 20 of the act to regulate commerce, relate only to such "accounts, records, and memoranda" as the commission is empowered by that section to prescribe, and (2) that said section, as amended by what is commonly known as the Hepburn Act, approved June 29, 1906, effective August 28, 1906, is not retroactive, but prospective only, and relates exclusively to the particular "accounts, records, and memoranda" which have been kept in pursuance of said act, and, hence, necessarily such as came into existence on and after the effective date of said act.

48 Entertaining these views, we consider that you have no authority at all to examine the correspondence files of the executive department as you have been permitted to do for some weeks; and no right to examine the "accounts, records, and memoranda" referred to in said section, except those which have been kept on and after August 28, 1906.

We are willing, however, in order to facilitate your work, to allow you to continue your examination of the executive department's correspondence files, as well as any "accounts, records, or memoranda" kept by and still in possession of the company, originating on and after the date last mentioned. This permission, it is to be understood, is not to embrace any communication between the representatives of this company and its counsel of a privileged nature, as between client and attorney.

Yours, truly,

(Signed) W. L. MAPOTHER,
First Vice President.

The COURT. Now, so far as the company expressed a willingness to have its accounts, etc., examined, is there any claim that they refused leave to do that; did they refuse afterwards to carry that willingness into effect?

Judge DURELLE. Yes.

The COURT. Of course, there may be a dispute on certain points that I am not inquiring about, but I am trying to limit the inquiry for the present to those things about which there have been disputes, and I want to know whether there was any claim by the Interstate Commerce Commission or the United States that the railroad company had refused, after this letter was written, to do what they expressed a willingness in that letter to do.

Judge DURELLE. They did.

The COURT. Let us go to that and see if they did that.

49 Judge DURELLE. I wanted to put in the other correspondence first.

Q. Were any other letters addressed to you by Mr. Mapother as first vice president of the defendant company explanatory of this letter?

A. Yes, sir.
Q. Will you produce them?
(The witness does so.)
Q. Read this, if you please.
A. LOUISVILLE & NASHVILLE RAILROAD COMPANY,
FIRST VICE PRESIDENT'S OFFICE, LOUISVILLE, KY.,
W. L. MAPOTHER, FIRST VICE PRESIDENT,
February 11, 1914.

Mr. WILL H. CARLETON,
Examiner Interstate Commerce Commission,
Hermitage Hotel, City.

DEAR SIR: Please refer to my letter of the 4th instant, outlining the views and policy of this company relative to your continued investigation of its affairs.

Your right to examine correspondence at all was denied, but, as a matter of grace, we expressed a willingness for you to continue your examination of the correspondence of the executive department on and after August 28, 1906. In view, however, of the fact that the matter has now been taken into the courts, where each side to the controversy will stand upon its legal rights, this permission is withdrawn and you are hereby notified that we will not allow you to examine this correspondence any further, except so much thereof as relates to the issuing of passes on and after January 1, 1911.

Yours, truly,

(Signed) W. L. MAPOTHER,
First Vice President.

50 (The paper referred to was put in evidence as Exhibit marked B.)

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
FIRST VICE PRESIDENT'S OFFICE, LOUISVILLE, KENTUCKY,
W. L. MAPOTHER, FIRST VICE PRESIDENT,
February 12, 1914.

Mr. WILL H. CARLETON,
Examiner Interstate Commerce Commission,
L. & N. Office Building, City.

DEAR SIR: Referring to our conversation this morning, during which you inquired for information as to the destruction of papers.

As you are aware, the statute contemplates and permits such destruction, and the Interstate Commerce Commission has prescribed regulations whereby carriers' papers, after a lapse of certain periods, may be destroyed. The law and regulations in this respect have at all times been complied with by this company.

As we have heretofore advised, we deny that in the pending investigation you have the right of access to papers antedating August 28, 1906. Consistent with this position, we must refuse you access to certificates, if any, of destruction relating to papers prior to that date, but we hereby furnish you all certificates of destruction relating to papers subsequent to such dates, including those certificates which

lap over and refer to papers both since that date and prior thereto. They consist of 213 packages bound in the secretary's contract covers, most of which contain numerous certificates; also six unbound certifications.

Yours, truly,

(Signed) W. L. MAPOTHER,
First Vice President.

51 (This was filed in evidence as Exhibit C.)

The COURT. Give me the date when you think the Hepburn law went into effect.

Mr. BRUCE. August 28th, 1906.

The COURT. All right.

By Judge DURELLE: Was any order made by the commission—I would like to get this right, if your honor please—prescribing the time after which correspondence might be destroyed.

A. Yes, sir.

Q. Have you the order of the commission in regard to that with you?

A. Yes, sir.

Q. Read that paragraph fixing that time.

The COURT: And give the date of the order.

Q. Give the date of the order and read that paragraph.

A. There are two orders, one dated June 10th, 1910. Under Item 64 it reads:

"Correspondence and records thereof relating to subjects listed in items one to sixty-three, inclusive." Under the column of "Period to be retained" it says "For the period prescribed for each item."

Q. Read what it says in the other order and give the date.

A. June 8th, 1911, which amends and supplements the prior order: "Under Item 64 correspondence and records thereof relating to subjects listed in items one to seventy-two, inclusive, for the period prescribed for each item."

By the COURT: What was the longest of those periods prescribed?

A. Permanent.

The COURT. Some were not to be destroyed at all?

Judge DURELLE. That is right.

52 Q. Were you or not refused access to any of the accounts, records, and memoranda made subsequent to August 28th, 1906?

A. Yes, sir.

The COURT. That is an immaterial question, unless you tell us what they were as near as you can in general terms. Go ahead. I am speaking to counsel. You should call that out.

Q. State the specific instance in which a record made subsequent to that date was refused you.

A. Certificates covering the destruction of records which were destroyed subsequent to August 28th, 1906.

Q. Those records were made subsequent to that date?

A. Yes, sir.

Q. What was your occupation before your appointment as a special agent and examiner of the Interstate Commerce Commission?

A. Immediately prior I was chief clerk of general accounts in the accounting department of the Minneapolis, St. Louis and Iowa Central Railway Company.

Q. How long were you in that position?

A. Five years, approximately.

Q. Prior to that did you have any experience in railroad offices?

A. About nine years, I would say, in railroad offices.

Q. In what departments?

A. In the accounting department.

Q. From your experience, can you state whether, in railroad transactions, there are many cases in which the details can not be ascertained without reference to the correspondence in relation thereto?

A. Yes, sir.

Mr. BRUCE. We object to that question.

The COURT. That is a hypothetical question.

Judge DURELLE. I am asking for the information.

53 The COURT. I think it is immaterial. The law does not depend on whether he can or can not do certain things.

Judge DURELLE. I think that is true, but I want to show by this witness, if your honor will permit it, that he knows the custom or railroads in that behalf.

The COURT. Does he know the custom of the Louisville & Nashville Railroad Company?

Judge DURELLE. I am speaking of railroads in general.

The COURT. That is too remote and opens up too wide an inquiry. Ask him if he knows the custom of this railroad in that regard.

Q. Do you know from your experience whether, in the transactions of the Louisville & Nashville Railroad Company, there are many cases in which the details of the transaction can not be ascertained without reference to the correspondence in relation to the transaction?

Mr. BRUCE. We object to that.

The COURT. We may assume all such things are very desirable. We know perfectly well you can not understand general statements without going into details, but that is not quite what we want to ascertain in this case. If you limit the answer to yes and no, all right.

(The question was read to the witness.)

A. Yes.

The COURT. That is all. I did not mean to say that you can go into the matter anything like in detail.

Judge DURELLE. We did not wish to.

The COURT. He can answer that question.

Q. State whether there are many such cases in the business of the Louisville & Nashville Railroad Company.

Mr. BRUCE. We object to that.

The COURT. I think we are going into an abstract investigation and I think it is well to stop right here.

Judge DURELLE. Does your honor sustain the objection?

The COURT. I do.

54 Judge DURELLE. I shall ask an exception.

The COURT. All right.

Judge DURELLE. You can ask the witness, Mr. Bruce.

Cross-examined by Mr. BRUCE:

You have said you were denied access to certain certificates of destruction of records. Were not the records covered by those certificates of destruction made prior to August 28, 1906?

A. Not having seen the certificates covering the destruction, I am unable to state.

Q. Then, you are not able to say that you were denied access to any certificates of destruction of records where the records were created on or subsequent to August 28th, 1906?

The COURT. Just state your knowledge on that subject. He asked you if you were able to state one way or the other on that question.

A. No.

Mr. BRUCE. That is all.

(Thereupon the plaintiff rested.)

The defendant thereupon offered in evidence the following documentary evidence:

1. A certified copy of an order of the Interstate Commerce Commission made November 10, 1913, which paper is as follows:

55 ORDER.

At a General Session of the Interstate Commerce Commission, held in its office in Washington, D. C., on the 10th day of November, A. D. 1913.

EDGAR E. CLARK,
JUDSON C. CLEMENTS,
JAMES S. HARLAN,
CHARLES A. PROUTY,
CHARLES C. MCCHORD,
BALTHASAR H. MEYER,
JOHN H. MARBLE,
} Commissioners.

No. 6319.

In re financial relations, rates, and practices of the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; and other carriers.

The United States Senate having, by Resolution No. 153, adopted November 6, 1913, directed the Interstate Commerce Commission

to investigate, take proof, and report to the Senate as soon as practicable—

First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

Second. What other railroads in the territory served by the Louisville & Nashvlile Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

56 Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory, in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad or any of its subsidiaries or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other facts or fact showing or tending to show the further relations between the Louisville & Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing or tending to show whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing or tending to show (a) the relations between the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Tennessee

57 Midland Railroad; the Tennessee, Paducah and Alabama Railroad; and any other railroad that have been purchased or leased by either or both of said railroads companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia and the arrangement made between the Louisville & Nashville and the Nashville, Chattanooga and Saint Louis Railway by

which the former uses the tracks of the said Western and Atlantic restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing or tending to show whether the ownership of the Louisville & Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dockyards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly, and restricts competition, and determines and fixes rates;

Tenth. Any fact or facts showing or tending to show whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company, or Atlantic Coast Holding Company, owns in the Louisville & Nashville Railroad and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tend to restrict competition and maintain and fix rates;

58 Twelfth. What amount, if any, the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Nashville and Decatur Railroad; and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads;

It is ordered, that a proceeding of inquiry and investigation be, and the same is hereby, instituted into and concerning the several matters and things set forth and referred to in the said resolution.

It is further ordered, that this proceeding be set for hearing at such times and places, and that such persons be required to appear and testify or to produce books, documents, and papers as the commission may hereafter direct; and that the investigation be carried

on in the meantime by such other means and methods as may be deemed appropriate.

And it is further ordered, that a copy of this order be served upon each of the following-named railroad companies and upon any other companies which may hereafter be designated by the commission:

59 Nashville, Chattanooga & St. Louis Railway;
Louisville & Nashville Railroad Company;
Nashville & Decatur Railroad Company;
Lewisburg & Northern Railroad;
Tennessee Midland Railroad Company;
Tennessee, Paducah & Alabama Railroad;
Western & Atlantic Railroad; and
Atlantic Line Railroad Company.

By the Commission:

(Signed) GEORGE B. MCGINTY,
Secretary.

The certificate was as follows:

INTERSTATE COMMERCE COMMISSION, WASHINGTON.

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the paper herewith attached is a true copy of order of the commission entered November 10, 1913, in the proceedings entitled "In re financial relations, rates, and practices of the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway, and other carriers," docket No. 6319, the original of which is now on file and of record in the office of this commission. Copy of said order was served upon Mr. J. A. Ridgely, Washington representative of the Louisville & Nashville Railroad Company, on November 13, 1913, the receipt for which is now on file and of record in the office of this commission.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the commission on this 16th day of March, 1914.

(Signed) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

60 It was conceded by counsel for the plaintiff that the Interstate Commerce Commission had prescribed forms for keeping the accounts, as set forth in the answer.

Said testimony was all the testimony introduced on behalf of the plaintiff or defendant in said cause.

The court, having examined the foregoing bill of exceptions, approves and signs the same and makes it a part of the record.

This 18th day of April, A. D. 1914.

WALTER EVANS,
District Judge.

61 The assignment of errors above referred to is as follows:

No. 164.

In the District Court of the United States for the Sixth District and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, Attorney General of the United States,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Assignments of errors.

That afterwards, to wit, on the eighteenth day of April, A. D., 1914, comes the United States of America, plaintiff in error, by George DuRelle, attorney of the United States, and Jos. W. Folk, chief counsel for the Interstate Commerce Commission, and says that in the record of the proceedings in the above-entitled cause in the United States District Court for the Sixth Circuit and Western District of Kentucky, there is manifest error in this, to wit:

I. In denying to plaintiff the writ of mandamus prayed for in the petition herein.

II. In adjudging that the petition of the plaintiff be dismissed without prejudice.

III. In considering the affirmative averments of the answer which are controverted by force of the act to regulate commerce and in support of which no evidence was introduced.

IV. In holding that communications between the attorney of a railroad company engaged in interstate commerce and other officers of such company are privileged as against the Government.

62 V. In holding that communications between officers of a railroad company engaged in interstate commerce are privileged and can not be examined by the Interstate Commerce Commission under the law.

VI. In holding that the correspondence of a railroad engaged in interstate commerce is not a part of the accounts, records, and memoranda of such railroad.

VII. In holding that a railroad engaged in interstate commerce is entitled to have any secrets as against its creator, the Government.

VIII. In holding that correspondence desired to be examined must be specified and its contents stated; as it is manifestly impossible to know what is contained in the correspondence until it is examined and the purpose of the examination must be to ascertain if the correspondence contains any matter germane to the investigation by the commission.

IX. In holding that a railroad engaged in interstate commerce may judge for itself what part of its correspondence it will permit the Interstate Commerce Commission to examine.

X. In holding that the provisions of section 20 of the act to regulate commerce as amended did not apply to accounts, records, and memoranda made previous to August 28, 1906.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky.
JOSEPH W. FOLK,
Chief Counsel for the Interstate Commerce Commission.
Attorneys for the United States.

63 The petition for a writ of error, above referred to, is as follows:

No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Petition for writ of error.

Now comes the United States of America, plaintiff herein, by George DuRelle, attorney of the United States, and Jos. W. Folk, chief counsel for the Interstate Commerce Commission, and says that on the 25th day of March, A. D. 1914, this court entered judgment herein in favor of said defendant against said plaintiff, and rendered a decision and judgment denying the plaintiff's motion and application for a writ of mandamus against said defendant, and adjudging that the plaintiff's petition be dismissed without prejudice, in which decision and judgment and proceedings certain errors were committed to the prejudice of the United States, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the said United States prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly
64 authenticated, may be sent to said Supreme Court of the United States.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky.
JOSEPH W. FOLK,
Chief Counsel for the Interstate Commerce Commission.
Attorneys for Plaintiff in Error.

65 The petition for appeal above referred to is as follows:

No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, Attorney General of the United States,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Petition for appeal.

Now comes the United States of America, plaintiff herein, by George DuRelle, attorney of the United States, and Jos. W. Folk, chief counsel for the Interstate Commerce Commission, and say that on the 25th day of March, A. D. 1914, this court entered judgment herein in favor of said defendant against said plaintiff, and rendered a decision and judgment denying the plaintiff's motion and application for a writ of mandamus against said defendant, and adjudging that the plaintiff's petition be dismissed without prejudice, in which decision and judgment and proceedings certain errors were committed to the prejudice of the United States, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the said United States does hereby appeal from said decision and judgment of March 25, 1914, to the honorable the Supreme Court of the United States for the correction of the errors so complained of, and prays that its appeal may be allowed, and that a transcript of the record, proceedings, and papers in
66 this case, duly authenticated, may be sent to said Supreme Court of the United States.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky,
JOS. W. FOLK,
Chief Counsel for the Interstate Commerce Commission,
Attorneys for Appellant.

67 Praecipe filed May 2, 1914.

No. 164.

United States District Court, Western District of Kentucky.

UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

Praecipe.

The clerk will copy—

1. Petition.
2. Answer.
3. Motion entered March 19, 1914, for writ of mandamus.
4. Order submitting said motion.
5. Opinion of the court.
6. Order overruling the motion for mandamus and dismissing the petition.
7. Assignment of errors.
8. Petition for an appeal.
9. Order granting an appeal.
10. Petition for a writ of error.
11. Order granting the writ of error.
12. Bill of exceptions.
13. And this praecipe.

JOSEPH W. FOLK,
GEORGE DURELLE,
Counsel for Appellant and Plaintiff in Error.

Service of a copy of this praecipe is hereby acknowledged this May 1st, 1914.

HELM BRUCE,
Attorney for Appellee and Defendant in Error.

68 UNITED STATES OF AMERICA,
District of Kentucky, Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between The United States of America, by James C. McReynolds, Attorney General of the United States, plaintiff, and Louisville and Nashville Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The United States of America, by James C. McReynolds, Attorney General of

the United States, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in said circuit, on the 1st day of June next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

A. G. RONALD,
Clerk of the District Court of the United States,
Western District of Kentucky.

Allowed by WALTER EVANS, *Judge.*

69 UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

To Louisville and Nashville Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, in said circuit, on the 1st day of June next, pursuant to an appeal and a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Kentucky, wherein The United States of America, by James C. McReynolds, Attorney General of the United States, is appellant and plaintiff in error, and you are appellee and defendant in error, to show cause, if any there be, why the judgment rendered against the said appellant and plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this sixth day of May, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

WALTER EVANS, *Judge.*

Service of a copy of the foregoing citation is hereby acknowledged this May 7th, 1914.

HELM BRUCE,
Attorney for Appellee and Defendant in Error.

70 *Certificate of clerk.*

I, A. G. Ronald, clerk of the District Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 69 pages contain a true and correct transcript of the record and proceedings in the case of the United States of America by James C. McReynolds, Attorney General of the United States, plaintiff, against the Louisville and Nashville Railroad Company, defendant, No. 164, copied herein in accordance with the praecipe filed and found on page 67 of this transcript, as the same appears from the files and records of my said office.

Witness my hand and the seal of said court this 12th day of May, A. D. 1914.

[SEAL.] A. G. RONALD,
Clerk of the District Court of the United States for the Western District of Kentucky.

(Indorsement on cover:) File No. 24238. Kentucky D. C. U. S. Term No. 499. The United States of America, by James C. McReynolds, Attorney General of the United States, plaintiff in error and appellant, *vs.* Louisville & Nashville Railroad Company. Filed May 25th, 1914. File No. 24238.

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2. Information of the relations existing between carriers is indispensable and necessary for the performance by the Commission of its proper duties	14
(*a*) The preservation of competition is one of the purposes of the act, and its existence or non-existence bears directly upon the questions of discrimination, reasonableness of rates, and similar matters	15
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ARGUMENT—Continued.

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The question is also important in ascertaining whether charges fixed by a carrier are just and reasonable within section 1 of the act ---------- 16

Interstate Commerce Commission v. Chicago, Great Western Ry. Co., 209 U. S. 108, 119; and cases cited.

The matter of competition is also to be considered in applying the provisions of sections 3 and 4 of the act with reference to undue or unreasonable preference to persons, etc., and the long and short haul clause ---------- 17

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 164.

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Central Yellow Pine Ass'n v. *Illinois Central R. R. Co.*, 10 I. C. C. 505.

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(*b*) Whether a carrier is subject to the act at all frequently depends upon the relation between it and other carriers ---------- 20

Cincinnati etc. Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 184.

(*c*) The inquiry of the Commission is proper as a basis for legislative recommendations, for legal prosecutions, and for many other purposes ---------- 21

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447, 474.

Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194, 208.

ARGUMENT—Continued.

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The inquisitorial work of the Commission has been the basis of practically all congressional legislation affecting interstate carriers during the past 25 years 25

3. Where the persons and subjects under consideration are within the field of the Commission's lawful activities, the courts will not inquire as to the ultimate object of the investigation 25

The plenary power of the Commission has been repeatedly recognized and upheld 25

Interstate Commerce Commission v. *Brimson*, *supra*.

Interstate Commerce Commission v. *Goodrich Transit Co.*, *supra*.

Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438.

Even if the investigation should divulge violations of the Anti-trust Act rather than of the Act to Regulate Commerce, that would not end the Commission's power 27

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93.

II. In the course of this investigation the Commission was entitled to inspect the "accounts, records, and memoranda," including the correspondence, of the defendant in error 28–37

1. The correspondence is not exempt from inspection merely because it is not of that class of accounts, records, and memoranda whose form the Commission has undertaken to prescribe 29

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, ATTORNEY GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR, APPELLANT,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

No. 499.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the Western District of Kentucky (212 Fed. 486), which refused a writ of mandamus sought by the United States under the provisions of section 20 of the Act to Regulate Commerce, as amended, 34 Stat. 584, 594, 595, ch. 3591.

The relief sought by the writ was to compel the defendant in error Louisville & Nashville Railroad

Company, a carrier engaged in interstate commerce, to comply with the provisions of the Act to Regulate Commerce by permitting the Interstate Commerce Commission, in the exercise of the authority conferred upon it, to have access by its authorized and duly appointed special agents and examiners to all of the accounts, records, and memoranda of the defendant company.

The Commission was engaged at the time in a "proceeding of inquiry and investigation" into certain matters and things set forth in Senate Resolution No. 153, adopted November 6, 1913, which is as follows (R. 18–19):

> *Resolved,* That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel, if necessary, and report to the Senate as soon as practicable—
>
> First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;
>
> Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad, and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad, or any of its subsidiaries, or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or

facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing, or tending to show, (a) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga and Saint Louis Railroad by which the former uses the tracks of the said Western and Atlantic Railway restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing, or tending to show, whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line, or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; The Nashville and Decatur Railroad; and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free annual passes; (b) the number of free-trip

passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads.

The proceeding of inquiry and investigation was instituted by the Commission on November 10, 1913 (R. 10, 13), and special agents and examiners duly appointed by the Commission were authorized to inspect and examine the accounts, records, and memoranda of the defendant in error (R. 5, 27).

On February 4, 1914, the Commission by one of these agents, Will H. Carleton, made demand upon the defendant in error for access to its accounts, records, and memoranda, including correspondence received and copies of correspondence sent by the defendant in error, both prior and subsequent to August 28, 1906, and the indexes pertaining thereto. This demand was refused, and access was denied except as to that portion of the accounts, records, and memoranda of the defendant in error the form of which had been prescribed by the Interstate Commerce Commission and which had been kept on and after August 28, 1906, and as to any corre-

spondence on and after January 1, 1911, which related to the issue of passes. There was thus withdrawn from the inspection of the Commission (1) all accounts, records, and memoranda kept prior to the 28th of August, 1906, (2) all accounts, records, and memoranda subsequent to that date the form of which had not been specifically prescribed by the Commission, (3) all correspondence (and the indexes thereto) upon any subject (other than the issue of passes subsequent to January 1, 1911), and (4) all certificates of destruction, if any, relating to papers antedating August 28, 1906.

This proceeding was thereupon instituted at the request of the Commission. To the petition praying mandamus the defendant in error answered, averring, in substance, (*a*) that the correspondence sought was private and confidential and (*b*) consisted in part of privileged communications between the defendant in error and its attorneys at law; (*c*) that no portion of its correspondence constituted "accounts, records and memoranda" within the meaning of the act; (*d*) that to interpret the act as allowing the Commission access to any and all accounts, records, and memoranda, and all correspondence, would subject the defendant in error to an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution; and (*e*) that, save as to the question of the issuance of free passes, no part of the subject-matter contained in the first 12 paragraphs of the Senate

Resolution lay within the power or jurisdiction of the Interstate Commerce Commission or within the scope or purposes of the Act to Regulate Commerce.

It was further contended as matter of law, although not specifically urged in the answer, that the right of inspection did not extend to any records whatsoever kept prior to August 28, 1906, the date when the Hepburn Act took effect.

The case was submitted upon the petition, answer, and the testimony of the examiner, Carleton. The court refused the writ and dismissed the petition, without prejudice, upon the grounds, as stated in its written opinion (R. 16; 212 Fed. 486), (1) that the matters set forth in the Senate Resolution did not relate to interstate commerce as regulated by the Interstate Commerce Act; (2) that the correspondence between the defendant in error and its counsel was privileged; and (3) that since the petition did not state the exact records or papers the examination of which was demanded it was inadequate as a basis for the writ. The court found it unnecessary to decide upon the contentions of the defendant in error with reference to accounts, records, and memoranda kept prior to August 28, 1906, and to the invasion of the constitutional guaranty against unreasonable search and seizure, indicating, however, that it leaned towards the position of the defendant in error in both respects.

SPECIFICATIONS OF ERROR.

The assignments of error raise broadly the right of the plaintiff in error to the relief prayed for and denied. The questions involved sufficiently appear from what has been said above as to the reasons assigned by the court for its action and the defenses asserted on the part of the railroad company.

ARGUMENT.

I.

The scope and purpose of the pending investigation is within the purview of the Act to Regulate Commerce and within the power and jurisdiction of the Interstate Commerce Commission.

1. The power of the Commission in the premises is drawn from the Act to Regulate Commerce, and the Senate Resolution simply serves to define the subjects to which the attention of the Commission is directed.

It should be understood at the outset that the Government does not rely upon Senate Resolution No. 153, *supra*, as the source of the Commission's authority to prosecute this investigation. It may be conceded that the power conferred upon the Commission can be increased or diminished only by act of Congress or joint resolution of the two Houses having the effect of law, and that a resolution adopted by one branch can add nothing to the authority theretofore given. What that authority is in the present instance may be ascertained by

reference to the following sections of the Act to Regulate Commerce, as amended:

> SEC. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; * * * and for the purposes of this Act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses, the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. (26 Stat. 743.)
>
> SEC. 13. * * * and the Interstate Commerce Commission shall have full authority and power at any time to institute and inquire, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before said Commission by any provision of this Act or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.

And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. (36 Stat. 539, 551.)

SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information.

* * * * *

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, and memoranda

> than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. (34 Stat. 584, 593, 594.)

The Commission therefore had the power to institute this investigation on its *own* motion and was necessarily the judge as to what information and what representations should be deemed sufficient to cause it to investigate. It had a clear right to give heed to the resolution of the Senate and to comply with it so far as its powers permitted. Having been stirred to action, it was not even bound to restrict its inquiry to the limits fixed by the resolution, although it appears that it elected to do so.

The resolution is material, therefore, only as it defines the scope and field of the investigation. It contains, as above set forth, 13 paragraphs. The thirteenth paragraph, which seeks for information relating to free passes issued by the defendant in error and other carriers since January 1, 1911, may be ignored at present for the reason that the defendant in error does not contest the right of the Commission to investigate that subject, and has supplied the Commission with satisfactory information thereon.

The remaining 12 paragraphs suggest the following topics for investigation:

First. The relations existing, whether by direct purchase, by ownership of stocks or bonds, by lease, by contract, or otherwise, between the Louisville & Nashville Railroad Company and certain other railroad companies engaged in interstate commerce. (See paragraphs 1, 2, 4, 5, 6, 7, 8, and 11.)

Second. The effect of these relationships upon competition and the fixing of rates. (See paragraphs 3, 4, 6, 7, 8, 10, and 11.)

Third. The ownership by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company of railroad terminals or terminal companies, steamboats or steamboat lines, docks or dockyards, and the effect of such ownership in establishing monopoly, restricting competition, or determining and fixing rates. (See paragraph 9.)

Fourth. The expenditure of moneys by the Louisville & Nashville Railroad Company and others in stifling competition, maintaining political or legislative agents, contributing to political campaigns, or creating public sentiment. (See paragraph 12.)

All these things the defendant in error contends, and the court below held, have no relation to interstate commerce as regulated by the act; and the court therefore felt itself without power to aid the Commission in procuring information with reference to the same.

2. Information of the relations existing between carriers is indispensable and necessary for the performance by the Commission of its proper duties.

The act expressly requires that the Commission shall keep itself informed as to the manner and method in which the business of all common carriers is conducted, and "shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created." These duties and objects are in the main to execute and enforce the provisions of the Act to Regulate Commerce as well as sundry other statutes which the Commission has been given power to administer, such as the Safety Appliance Acts of 1893 and 1903, Arbitration Act of 1898, Accident Reports Act of 1901, Medal of Honor Act of 1905, and Hours of Service Act of 1907. In addition to these administrative duties the Commission is required by section 21 of the act to make an annual report to Congress of such information and data collected by it "as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary"; and thus its inquiry may extend over the still wider domain of legislation. Can it be contended that the intercorporate relations of common carriers are for it a forbidden field? The answer would seem to be easy.

(a) The preservation of competition is one of the purposes of the Act, and its existence or non-existence bears directly upon the questions of discrimination, reasonableness of rates, and similar matters.

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights." *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 276.

It was not designed to prevent competition between different roads, but, on the contrary, if a reasonably free competition between carriers subject to the act is preserved that alone will go far to accomplish its purposes; hence it is that the preserving of competition is itself one of the objects of the act. Said Commissioner Veazey in *Gerke Brewing Co.* v. *Louisville & Nashville R. R. Co.*, 5 I. C. C. 596, 606:

> To preserve legitimate competition between public carriers, that is, competition which is not contrary to the public interest, and to prevent that competition which is illegitimate, or in other words opposed to the public welfare, is precisely that which,

among other things, the law undertakes to accomplish.

See also *In the Matter of Export and Domestic Rates*, 8 I. C. C. 214, 260.

Even if it be contended that the preservation of competition is not of itself one of the primary purposes of the act, the question is none the less important in many respects; and in none more so than in ascertaining whether charges fixed by a carrier are just and reasonable within section 1 of the act. Thus it has been held that in fixing their own rates railroad companies may take into account the competition with other carriers provided only that competition is genuine and not a pretense. *Interstate Commerce Commission* v. *Chicago, Great Western Ry. Co.*, 209 U. S. 108, 119; citing *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263; *Tennessee etc. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144; *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648; *East Tennessee etc. Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 190 U. S. 273.

In *Central Yellow Pine Association* v. *Illinois Central Railroad Co.*, 10 I. C. C. 505, 541–542, it was said:

> The Act to Regulate Commerce (section 1), in prohibiting unreasonableness of rates,

> in effect forbids whatever conduces to such unreasonableness. In any event, it is incumbent upon this Commission when the reasonableness of rates is in issue before it, to consider how those rates were brought about—whether they are the product of untrammeled competition or the result of a concert of action or combination between the carriers establishing and maintaining them.

This language was quoted with approval in *Tift* v. *Southern Railway Co.*, 10 I. C. C. 548, 581.

Again, in *Sioux City Terminal Elevator Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 27 I. C. C. 457, the Commission said that it "always has and necessarily must continue to recognize the effect of *bona fide* competition in the making of rates."

And in *Kiser Company* v. *Central of Georgia Ry. Co.*, 17 I. C. C. 430, 440, it is said:

> * * * Although the primary consideration in cases of this nature before the Commission is the reasonableness of the rates involved, through whatever agency established, the practical unification of carriers in increasing their rates may and should properly be taken into account in determining whether an increase is in fact justified or is the result of a concerted action without regard to the justness of the increased rate.

Nor does the matter of competition concern the fixing of rates alone. It is also to be considered in applying the provisions of sections 3 and 4 of the

act with reference to undue or unreasonable preference to persons, corporations, and localities, and the long and short haul clause. Said this court, speaking by Mr. Justice Shiras, in *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 164:

> In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable * * *.
>
> But the question whether competition as affecting rates is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court.

And at page 167:

> In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining

> the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.

The subject is material, moreover, in connection with section 5 of the act (the pooling section), the object of which, it has been said, is to prevent "any contract, agreement, or combination" between otherwise competing carriers by which competition between them may be done away with. *Central Yellow Pine Association* v. *Illinois Central R. R. Co.*, 10 I. C. C. 505; *Tift* v. *Southern Railway Co.*, 10 I. C. C. 548, 580. And in *East Tennessee etc. Ry. Co.* v. *Interstate Commerce Commission*, 99 Fed. 52, 61, it is said:

> * * * The interstate commerce law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect.

In short, as Commissioners Clements and Marble well say in their concurring report in *The New England Investigation*, 27 I. C. C. 560, 617—

> No competition between carriers is unimportant. The fact that a line carries little tonnage does not prove that it is valueless to

the public. Its potential competition serves always to insure better service and fairer treatment by the other lines. Occasionally it has an influence upon rates. Moreover, any suppression of competition involves larger issues, including the injurious effect of private monopoly upon the competitive society which tolerates it, which must be discussed by those who are charged with the duty of legislation.

(b) Whether a carrier is subject to the act at all frequently depends upon the relation between it and other carriers.

Whether a carrier is within the control of the Commission in any respect not infrequently depends upon the relations existing between itself and others. These relations may be of a character to bring within the act a carrier which but for their existence would not be subject to it, as, for instance, where a railroad company whose road is wholly within the bounds of a single State voluntarily engages in interstate commerce by making arrangements with another for the continuous carriage of goods through another State. *Cincinnati etc. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184. There is no need to cite authorities to show that the existence of a common arrangement between carriers such as is dealt with in section 1 of the act, which may have the effect of bringing a carrier within the act and under the supervision of the Commission, is a fact about which the Commission is entitled to be informed.

(c) The inquiry of the Commission is proper as a basis for legislative recommendations, for legal prosecutions, and for many other purposes.

When it is remembered that neither the duties of the Commission nor the objects for which it was created are limited to the enforcement of the specific provisions of the Act to Regulate Commerce, but that it is also charged with the obtaining of such information as may be necessary as a basis of intelligent legislation by Congress upon all "questions connected with the regulation of commerce," it may well be asked what subject it is connected with carriers as to which the Commission may not inquire? What are the secrets, if any, that a carrier is entitled to withhold from the Commission?

This extra-administrative duty of the Commission to keep itself informed of the manner and methods in which the business of common carriers is conducted, not merely for the purpose of preventing violations of the act and enforcing its specific provisions, but for the "determination of questions connected with the regulation of commerce," and the further duty of "making such recommendations as to additional legislation relating thereto as the Commission may deem necessary," has received ample recognition by this court.

Thus in *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, the Commission was pursuing an investigation upon its own motion, and, in

the course of the inquiry, it was deemed important to inquire as to the ownership of stock in the Elgin, Joliet & Eastern Railway by the Illinois Steel Company. The witness refused to answer. The court said (p. 474):

> An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, which involved the power of the Commission to require reports from common carriers and to prescribe a system of

bookkeeping and accounting, Mr. Justice Day, in delivering the opinion of the court, said (p. 208):

> * * * We must remember, also, in this connection, that under section 21 of the act the Commission is required to make a report each year to the Congress containing such information and data as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation as the Commission may see fit to make.

And in the dissenting opinion by Mr. Justice Day in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, in which Mr. Justices Harlan and McKenna concurred, it is said (pp. 423, 424):

> The reports of committees which accompanied the enactment of the Interstate Commerce Law in its original form show that importance was attached to the power conferred upon the Commission to make investigations as well as to make orders relating to specific complaints as to practices affecting the conduct of interstate commerce and the instrumentalities by which the same is carried on. It was to have a power of investigation, such as had been conferred upon similar bodies in the States and in the English acts regulating the subject, with a view to eliciting information important to be had, in order to lay the basis for intelligent and efficient action in the legislative branch of the Government to which the Constitution

has delegated power to regulate commerce among the States and with foreign nations.

In speaking of this power, Judge Cooley, the eminent chairman of the Commission, in its first annual report, said:

"This is a very important provision and the Commission will no doubt have frequent occasion to take action under it. It will not hesitate to do so in any case in which a mischief of public importance is thought to exist, and which is not likely to be brought to its attention on complaint of a private prosecutor."

In numerous instances investigations have been conducted by the Commission having in view the exercise of its authority to afford information as to the manner and methods in which corporations engaged in interstate commerce are conducting their business. These investigations have been undertaken upon the initiative of the Commission; witnesses have been subpœnaed; and testimony has been taken without objection from those interested that the power of the Commission conferred by the acts of Congress had been exceeded. While these considerations are not determinative of the extent of the powers conferred in the act, they are suggestive of the practical construction which those interested have put upon it.

As suggested in the last paragraph of the above quotation, an examination of the debates of Congress and the decisions of the courts will show that

it was upon information developed by the Commission and reported to Congress that the Elkins Law, the Safety Appliance Law, the Employers' Liability and Hepburn Acts, were successively based; in other words, the inquisitorial work of the Commission has been the basis of practically all congressional legislation affecting interstate carriers during the past 25 years.

3. Where the persons and subjects under consideration are within the field of the Commission's lawful activities, the courts will not inquire as to the ultimate object of the investigation.

The position of the defendant in error and that of the court below seem alike to be based upon the assumption that the purpose of the pending investigation is not to obtain information which will enable the Commission to enforce the Act to Regulate Commerce but to obtain information showing a violation of the Anti-trust Act or of some other law. To this we answer that if the Commission is authorized by law to make the investigation, any inquiry into its motive or purpose is out of place. In view of the broad and sweeping language in which the power to investigate is conferred, the courts will not be astute to devise limitations which Congress itself has not imposed.

On the contrary, the plenary power of the Commission has been repeatedly recognized and upheld. The performance of the duties of carriers to the public can only be efficiently enforced, as was said

by this court in *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 474,

> through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules

as may from time to time be prescribed.

And, again, in *Interstate Commerce Commission* v. *Cincinnati etc. Ry. Co.*, 167 U. S. 479, 506:

> * * * It [the Commission] is charged with the general duty of inquiring as to the management of the business of railroad companies and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business.

And in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438, it is said:

> The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act;

while in *Interstate Commerce Commission* v. *Goodrich Transit Co., supra,* the Commission was held entitled to an accounting and disclosure of all the revenues of the Goodrich Transit Company, although more than 80 per cent of its revenues were

derived from business not within the regulatory power of the Commission, and of all the revenues of the White Star Line, although more than 99 per cent of its revenues were not within such regulatory power.

Notwithstanding the fact that this investigation was prompted by a resolution of the Senate, and that the Commission is requested to report the result to it, who can say that anything more will eventuate than the taking of steps by the Commission to enforce the provisions of the Act to Regulate Commerce if they shall be found to have been violated? Who shall say, on the other hand, that the Commission may not be persuaded as the result of the investigation to recommend to Congress further legislation?

Even if the investigation should divulge violations of the Anti-trust Act rather than of the Act to Regulate Commerce, that would not of itself end the Commission's power, for, as said by this court in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93, while the Commission can not exercise its power to fix rates upon information gathered under the provisions of section 12 without a hearing, "the information may be used as basis for instituting prosecutions for violations of the law, and for many other purposes."

It may well be that the Commission might lay the result of its investigation before the Depart-

ment of Justice or might recommend to Congress additional legislation connected with the regulation of commerce partaking of the character of the Anti-trust Acts and calculated to prevent restraint upon competition.

Instances of past investigations conducted by the Commission similar in character to the one at bar, and susceptible of just such uses, may easily be found. Among many others may be mentioned, using the title given to them by the Commission, those "In the matter of consolidations and combinations of carriers, relations between such carriers, and community of interests therein, their rates, facilities and practices," 12 I. C. C. 277, July 11, 1907 (disclosing the unlawful combination of the Union Pacific and Southern Pacific railroads), and "The New England Investigation," 27 I. C. C. 560, June 20, 1913 (concerning the New York, New Haven & Hartford Railroad Company and its activities).

II.

In the course of this investigation the Commission was entitled to inspect the "accounts, records, and memoranda," including the correspondence, of the defendant in error.

Section 20 of the Act to Regulate Commerce gives the Commission the right of access at all times to all accounts, records, and memoranda kept by carriers subject to the act, and such is the access which

the Commission is now seeking. But in so far as the correspondence of the defendant in error is concerned, the right is challenged upon various grounds. These may now be considered.

1. The correspondence is not exempt from inspection merely because it is not of that class of accounts, records, and memoranda whose form the Commission has undertaken to prescribe.

It is contended, in substance, by the defendant in error that the right of the Commission to inspect " accounts, records, and memoranda " is restricted to those for which the Commission is empowered to prescribe and has prescribed forms, and that the Commission not only has not prescribed, but obviously could not prescribe, any forms for correspondence, and that any attempt to do so would be absurd.

It is true enough that the Commission has never pretended to prescribe forms for all records, accounts, and memoranda, nor for correspondence, and that it obviously could not do so. Congress clearly did not contemplate that it should, for the language which confers the power to prescribe forms is permissive only, saying that " the Commission *may, in its discretion,* prescribe the forms of any and all accounts, records," etc.

The statute, however, does not say that the Commission shall have access only to those accounts, records, and memoranda for which it has prescribed forms; on the contrary, it says in unquali-

fied terms that "the Commission shall at all times have access to *all* accounts, records, and memoranda kept by carriers subject to this act."

And so, again, it is declared that the Commission "may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine *any and all* accounts, records, and memoranda kept by such carriers."

Nor is this broad language in any wise limited by the further provision that "it shall be unlawful for such carriers to keep any other accounts, records, and memoranda than those prescribed or approved by the Commission." This must be taken, as a matter of course, to relate only to records of the character or class whose form has been prescribed, and not to forbid the carrier from keeping any other accounts, records, and memoranda of any other sort or upon any other subject whatsoever.

Section 20 also provides a penalty for the failure or refusal of a carrier to submit such accounts, records, and memoranda *as are kept* for the inspection of the Commission or one of its authorized agents or examiners; that is to say, such records as are kept either in pursuance of the rules prescribed by the Commission or otherwise.

Obviously these provisions mean what they say. Indeed, the very fact that the Commission is charged with the enforcement of the provision relating to the keeping of accounts, records, and

memoranda equally with all other provisions of the act emphasizes the necessity for its general access to the carriers' papers. If restricted in its right of inspection to records for which forms have been prescribed, it will be denied the opportunity to learn at first hand whether its instructions have been followed and whether a carrier does or does not keep upon the same subjects other "accounts, records, and memoranda than those prescribed by the Commission."

In many other respects the administration of the act in the hands of the Commission can not be effective unless the Commission is given free access to all the records of the carriers.

Without this means of informing itself the Commission will not be able to comply with the broad provisions of section 12, which authorize and require it to inquire into the management of the business of all common carriers subject to the act and to keep itself informed as to the manner and method in which such business is conducted, and to obtain from the carriers all information necessary to enable it to perform the duties and carry out the objects for which it was created. To fully perform the functions for which this section provides the Commission must have access to every written or printed paper or document of any kind which may throw light upon the business done. The contention that the letters received and copies of letters forwarded by the carriers would not throw light

upon such business would be so contrary to common knowledge and experience that it is not to be expected that any such contention will be made. The court will take judicial notice of the fact that in many instances the only detailed account of a business transaction is that contained in letters written by the parties. In many cases proof of such details could not be obtained in their absence. Those who write letters pass away, but the letters do not; they remain and constitute in part the full, complete, and permanent records which by section 20 of the act the carriers are required to keep, and to permit the Commission through its special agents or examiners to examine.

What is more likely to be the subject of correspondence, rather than a matter of bookkeeping, than those arrangements for unjust discriminations, undue and unreasonable preferences, special rates, rebates, drawbacks, and the pooling of freights, which the statute denounces? Can it be said that free access by the Commission to all correspondence of the carrier is not calculated to make it difficult for the carrier to secretly engage in such practices?

Reverting to the terms of section 20 we find, after the provisions which have been quoted and commented upon above, the following (Act of February 25, 1909, 35 Stat. 648, 649):

> * * * *Provided*, That the Commission may in its discretion issue orders specify-

> ing such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

This proviso clearly relates to more than the accounts, records, and memoranda for which the Commission may have prescribed forms. The word "document" is perhaps as all-embracing as any which could have been chosen. That it is recognized as including letters and copies of letters appears from the language of this court in *Wilson* v. *United States*, 221 U. S. 361, 377, where it is said:

> * * * The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books.

So, again, it may be truly said that letters are both records and memoranda. A letter, it has been frequently held, is a sufficient "note or memorandum" within the meaning of the statute of frauds; and, as is well known, letters and copies of letters are among the most important records of every business concern.

It is therefore respectfully submitted that the letters and copies of letters referred to in the petition for mandamus are included in the terms "ac-

counts, records, and memoranda " as employed in section 20 of the Act to Regulate Commerce, and of course that indexes to the letters and copies are also included in those terms because they are memoranda pertaining to the files in which the letters and copies are kept.

2. No peculiar privilege attends the so-called private and confidential correspondence between officers and agents of the defendant in error.

Defendant in error alleges that the correspondence, access to which was denied, contains private and confidential communications between its officers and agents regarding various matters that do not in any way pertain to the provisions of the Act to Regulate Commerce, nor to any other act of Congress, the provisions of which it is made the duty of the Interstate Commerce Commission to enforce, such as the internal affairs of the defendant in error, its proposed constructions and extensions in the future, its policies with competing and rival railroads, its relations to the labor organizations, and a variety of other subjects which are of a private and confidential nature.

This, again, is an effort to ingraft upon the language of the act an exception which the act does not contain. There is nothing to be found therein which so limits the power and duty of the Commission to keep itself informed as to exclude from its inquiry matters which the defendant in error claims to be of a private and confidential nature.

Nor does any right of privacy attach to corporate records as against the visitatorial power of the State, or of the National Government, where the corporate activities are in the domain subject to the powers of Congress. *Wilson* v. *United States*, 221 U. S. 361; *Wheeler* v. *United States*, 226 U. S. 478; *Grant* v. *United States*, 227 U. S. 74.

To permit an interstate carrier to decide for itself on any ground whatsoever what records it will and what it will not allow the Commission to inspect, clothes the carrier with power to nullify for all practical purposes the provisions of section 20, giving the right of inspection, and the provisions of section 12, giving the right to inquire into the conduct of the business of interstate carriers, and in consequence to prevent the effective enforcement of the cardinal aims of the statute. To permit this would render the statute futile and the Commission impotent.

But that Congress in enacting section 20 not only did not intend the Commission to be limited in its power of inspection to such records as might be submitted to the gaze of the general public, but expressly contemplated access by the Commission to records which the interests of the carriers might require to be treated as private and confidential, is affirmatively shown by the fact that it incorporated the following clause in the statute (34 Stat. 594):

> Any examiner who divulges any fact or information which may come to his knowl-

> edge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

3. The privilege asserted as to the correspondence between the carrier and its attorneys is no warrant for refusing the writ as to other documents.

It is asserted on the part of the defendant in error that the correspondence to which it denied the Commission access "also contains confidential, private, and privileged communications between the defendant and its attorneys at law" (R. 8); and the court below laid great stress upon the privileged character of these letters as a ground for refusing the writ.

It may be observed again that the language of the act is sufficiently broad to include these letters, as well as all other documents, and that there is no warrant for writing into the law any exceptions which it does not expressly contain. On the other hand, there is force in the suggestion that a privilege so ancient and well established as that governing communications between counsel and client is not to be overthrown except by language expressly directed to that end. So far as the present case is concerned, it is perhaps unnecessary to determine this ques-

tion, since the privilege, if it exists, can certainly not be used to protect any documents other than those which fall within it. And the court, if it were of opinion that such letters are exempt from examination by the Commission, could have so limited the order granting the writ of mandamus as to exclude this particular correspondence from the effect of the writ.

III.

The proposed examination is not an unreasonable search and seizure, nor does it violate any constitutional right of the defendant in error.

The object of the Fourth as well as of the Fifth Amendment is to protect the citizen from compulsory testimony against himself. In *Boyd* v. *United States*, 116 U. S. 616, the history of the adoption and the interpretation of the Fourth Amendment were fully discussed and the relation between that and the Fifth Amendment was declared. Mr. Justice Bradley, in delivering the opinion of the court, said (p. 633):

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a

> man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

This language met with the entire approval of this court in the later case of *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, which involved the power of the Interstate Commerce Commission under the Act to Regulate Commerce to compel the testimony of witnesses and the production of contracts relating to the purchase by a railroad company of coal at the coal mines. It was held that the compelling of the testimony and the production of the documents did not deprive the witnesses of any rights under the Fourth and Fifth Amendments. In delivering the opinion of the court Mr. Justice Day, after stating the substance of the above quotation, said (p. 46):

> As we have seen, the statute protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate. Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure.

The case at bar involves no question of the power of the Commission to compel witnesses to testify; it involves solely the right of the Commission to examine, by its authorized and duly appointed

agents, the records of a railroad corporation which is an interstate carrier.

It may therefore be questioned whether the defendant in error, being a corporation, and not entitled to plead the immunity of the Fifth Amendment, can plead the immunity of the Fourth Amendment. See concurring opinion by Mr. Justice McKenna in *Hale* v. *Henkel*, 201 U. S. 43, at page 82. That a corporation is not entitled to plead the immunity of the Fifth Amendment was declared in the opinion of the court in this case, which was delivered by Mr. Justice Brown, in the following language (pp. 74–75):

> * * * Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom beyond the protection of

his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law and in accordance with the Constitution. Among his rights are a refusal to incriminate himself and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. * * *

It is true that the corporation in this case was chartered under the laws of New Jer-

> sey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws.

That a corporation can not restrict the production of its books and papers on the ground of self-crimination was also held in *Wilson* v. *United States*, 221 U. S. 361, wherein Mr. Justice Hughes, in delivering the opinion of the court, said (p. 382):

> What then is the status of the books and papers of a corporation which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands

> the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.

True, it is said in the opinion of the court in *Hale* v. *Henkel* that an order for the production of books and papers by a corporation may constitute an unreasonable search and seizure within the Fourth Amendment if it is so sweeping in its terms as to call for the production of such a large portion of the records of the corporation that their absence will put a stop to the business of the company (pp. 76–77). But this has no application to the case at bar, for the Commission seeks only to inspect the records of the defendant in error; the seizure of those records, in the sense of a forcible dispossession of the defendant in error, is not contemplated. For this reason it is not necessary for the plaintiff in error to rely upon the dissent from the view

advanced in the opinion by Mr. Justice Brown, which was expressed in the concurring opinions by Mr. Justice Harlan (p. 78) and Mr. Justice McKenna (pp. 82–83).

Giving to the Fourth Amendment the application for which the defendant in error contends would amount not merely to limiting the inquisitorial power of the Interstate Commerce Commission, it would also operate to restrict the general power which is conferred upon Congress to regulate commerce among the States and to make laws necessary and proper to that end.

This court seems to have had this phase of the matter in mind when, at the end of the opinion in *Hale* v. *Henkel,* 201 U. S. 43, 77, it said:

> Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.

Having the power to regulate, Congress must also be held to have the power to determine what means are appropriate for carrying into effect its control.

As was said with reference to the taxing power upon a similar contention in *Flint* v. *Stone Tracy Company,* 220 U. S. 107, 174, 176:

> It is urged in a number of the cases that in a certain feature of the statute there is a

violation of the Fourth Amendment of the Constitution, protecting against unreasonable searches and seizures. This Amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws. *Boyd* v. *United States,* 116 U. S. 632. It does not prevent the issue of search warrants for the seizure of gambling paraphernalia and other illegal matter. *Adams* v. *New York,* 192 U. S. 585. It does not prevent the issuing of process to require attendance and testimony of witnesses, the production of books and papers, etc. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25.

* * * * *

The contention is that the above section as originally framed and as now amended could have no legitimate connection with the collection of the tax, and in substance amounts to no more than an unlawful attempt to exhibit the private affairs of corporations to public or private inspection, without any substantial connection with or legitimate purpose to be subserved in the collection of the tax under the act now under consideration. But we can not agree to this contention. The taxation being, as we have held, within the legitimate powers of Congress, it is for that body to determine what

means are appropriate and adapted to the purposes of making the law effectual.

It is submitted that, since the power of investigation claimed by the Commission is sanctioned both by constitutional and legislative authority, it can not be said to contemplate an unreasonable search.

IV.

The right to inspect accounts, records, and memoranda, including correspondence, is not limited to those only which have come into being since August 28, 1906, but extends to all those in the possession of the carrier whenever created.

It was contended in the court below that the right of inspection having been created by the Hepburn Act, approved June 29, 1906, 34 Stat. 584, and effective August 28, 1906, attached only to those accounts, records, and memoranda which came into being after that date. As expressed in the letter addressed by the First Vice President of the defendant in error to examiner Carleton (R. 28),—"It is the opinion of our general counsel * * * that said section, as amended by what is commonly known as the Hepburn Act, approved June 29, 1906, effective August 28, 1906, is not retroactive, but prospective only, and relates exclusively to the particular 'accounts, records and memoranda' which have been kept in pursuance of said act, and, hence necessarily such as came into existence on and after the effective date of said act."

The court below discussed this contention, but declined to decide it, holding it not essential to the decision of the case.

It is difficult, indeed, to see on what such a contention can be based.

1. The act is not retrospective in a legal sense simply because it affords access to preexisting documents.

In *The Society etc.* v. *Wheeler,* 2 Gall. 104, 139, Mr. Justice Story defines a retroactive or retrospective law:

> * * * Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.

Perhaps this definition has never been improved upon. Accordingly this court held in *Sturges* v. *Carter,* 114 U. S. 511, that a law of the State of Ohio authorizing auditors to extend inquiries into returns of property for taxation over a period of four years next before that in which the inquiry is made, is no violation of that provision in the Constitution of that State which declares that "the General Assembly shall have no power to pass retroactive laws." Judge Story's definition was quoted with approval.

It is clear that the present statute is likewise not within this definition. The Hepburn Act as

a whole has comparatively little effect upon substantive rights, and the provision under consideration has none. The act is chiefly a remedial statute designed to protect the public interests; a fact to which, it has been said (27 Halsbury's Laws of England, p. 160), great weight is to be attached in determining whether a statute is or is not retrospective. The Commission in its report of 1907 said of the Hepburn Act (p. 6): "The substantive provisions of the original act, forbidding the exaction of unreasonable charges and prohibiting discriminations between persons and places, were unchanged by the legislation of 1906. The main purpose of that legislation was to provide more adequate means for the enforcement of rights and duties already declared to exist."

Holding that this provision of the statute gives the Commission authority to examine accounts, records and memoranda made before it went into effect does not amount to giving it a retrospective operation. Indeed had Congress in the Hepburn Act for the first time declared to be illegal the practices which have long been condemned by the Commerce Act the statute would not be truly retrospective, though it rendered invalid prior contracts or agreements which were valid when entered into by the parties. A statute is not necessarily retroactive or retrospective because its operation in a given case may depend on an occurrence anterior to its pas-

sage. *In re Scott,* 126 Fed. 981. To construe the Anti-trust Law of July 2, 1890, as applying to contracts made prior to its enactment, does not give it a retroactive or *ex post facto* effect. *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 316.

In *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, reversing 133 Ky. 652, it was held that an agreement between the plaintiffs and the defendant railroad company by which the defendant agreed, in consideration of injuries received by the plaintiffs while passengers on the defendant's railroad, to issue to the plaintiffs free passes over its railroads during their lives, although valid when made, was rendered invalid by the Hepburn Act and could not be enforced against the company by suit. This decision was cited, and a similar view expressed, in the New York case of *Gill* v. *Erie R. R. Co.,* 151 App. Div. 131, 136.

In *Philadelphia etc. R. R. Co.* v. *Schubert,* 224 U. S. 603, wherein it was held that section 5 of the Employers' Liability Act of 1908, providing that exemptions from liability shall be void, applies to agreements made before the enactment of the statute, Mr. Justice Hughes, in delivering the opinion of the court, said (pp. 613–614):

> It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But

that the provisions of section 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character can not be doubted.

* * * * *

Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

2. The intent of the act is to afford access to preexisting documents. Even if, when so construed, it can properly be called retrospective, it is none the less within the power of Congress.

There are no constitutional restrictions upon Congress in the matter of retrospective legislation as there are in some of the States. *Satterlee* v. *Matthewson,* 2 Pet. 380; *Sinking-Fund Cases,* 99 U. S. 700. And an act of Congress may act retrospectively when the language employed makes it clear that it shall so operate. *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 478.

The rule against giving a statute a retrospective operation is, after all, merely a rule of construction, and if it is clear that the legislative power intended an act to operate retrospectively, then, even though the intention is not declared in express words, it should be given that operation, if existing rights and obligations are not thereby impaired.

The main purpose of the Hepburn Act being to provide more adequate means for the enforcement of rights and duties declared to exist, one of the means so provided is the power of the Commission to inspect the records of interstate carriers. There is nothing to indicate that this power was to remain in abeyance until records should thereafter be created, nor can any such intent be ascribed with reason to Congress. Existing practices of interstate carriers which are condemned by the act, and which it is the duty of the Com-

mission to end, may have their origin in agreements entered into long before the act was passed. Present rates and discriminations may be the result of argeements in restraint of competition which are to be found in the files of earlier correspondence, or in memoranda or records of an earlier date. Having in mind the particular circumstances under which the provision was adopted, that it was designed to protect the public interest, and that it impairs no existing rights or obligations, but, on the contrary, is a means for their effective enforcement, it seems obvious that it was as much the purpose of the provision to enable the Commission to inspect the records which were made before as those which were made after it went into effect.

While the general rule is that statutes are to be considered as having only a prospective operation unless the legislative purpose and intent of giving them a retrospective effect is clear, this rule applies chiefly, if not only, to those statutes which affect some vested right or interest existing under a prior law. There is no room in this instance for the presumption stated in *Cameron* v. *United States,* 231 U. S. 710, 720, that—

> the law-making power is acting for the future and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force.

V.

The allegations of the petition are sufficiently definite to warrant the relief prayed.

The trial court in its opinion denying the writ of mandamus lays emphasis upon what it is pleased to call "the meager, vague, and extremely general statements" in the petition, and says that it can not grant the writ under the vague and general allegations of the complaint (R. 24, 25). While the allegations in the petition may be general, yet if the positions hereinbefore taken are sound, it contains all the allegations necessary to show the authority of the Commission to make the attempted investigation, the right of the Commission to examine the records, including the correspondence which it seeks to examine, and the right to the remedy for which it prays, with the possible exception (not hereby conceded) of the right to have the writ extend to the correspondence of the defendant in error with its attorneys at law.

It is certainly not to be expected that in a case of this character the Commission should set out the exact records or papers which it desired, or should catalogue and identify the correspondence (which it had never seen) to which access was sought. Manifestly this would be a wholly impossible task. The topics under consideration were sufficiently stated in the Commission's order and the Senate Resolution therein contained. In order fully to investigate those topics it sought to exercise the right given it by law of unrestricted access to the records

of the defendant in error, certainly to all those of a non-privileged character. The case turns on the existence or non-existence of this right, and relief must be granted or denied accordingly.

If it should be held that the prayer of the petition is too broad in that the writ prayed for would embrace correspondence between the defendant in error and its attorneys, that is to be met by restricting the writ and not by denying it. Whatever may formerly have been the rule, it is now well settled that the fact that the prayer in mandamus is for excessive relief does not preclude the granting of such relief as the relator is entitled to have under the facts stated. Nor does the old rule any longer obtain, although an alternative writ has issued. The peremptory or final order need not conform either to the prayer of the petition or to the alternative writ. Reason dictates and practice has now established that the court shall conform the remedy to the facts alleged and proved. *West Virginia Northern R. R. Co.* v. *United States* (C. C. A. 4th Cir.), 134 Fed. 198, 203.

CONCLUSION.

The judgment should be reversed and the cause remanded with directions to award the writ.

JOHN W. DAVIS,
Solicitor General.

THEODOR MEGAARDEN,
Attorney.

NOVEMBER, 1914.

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JAMES D. MAH
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No. 499

In the Supreme Court of the United States,

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR, APPELLANT,

v.

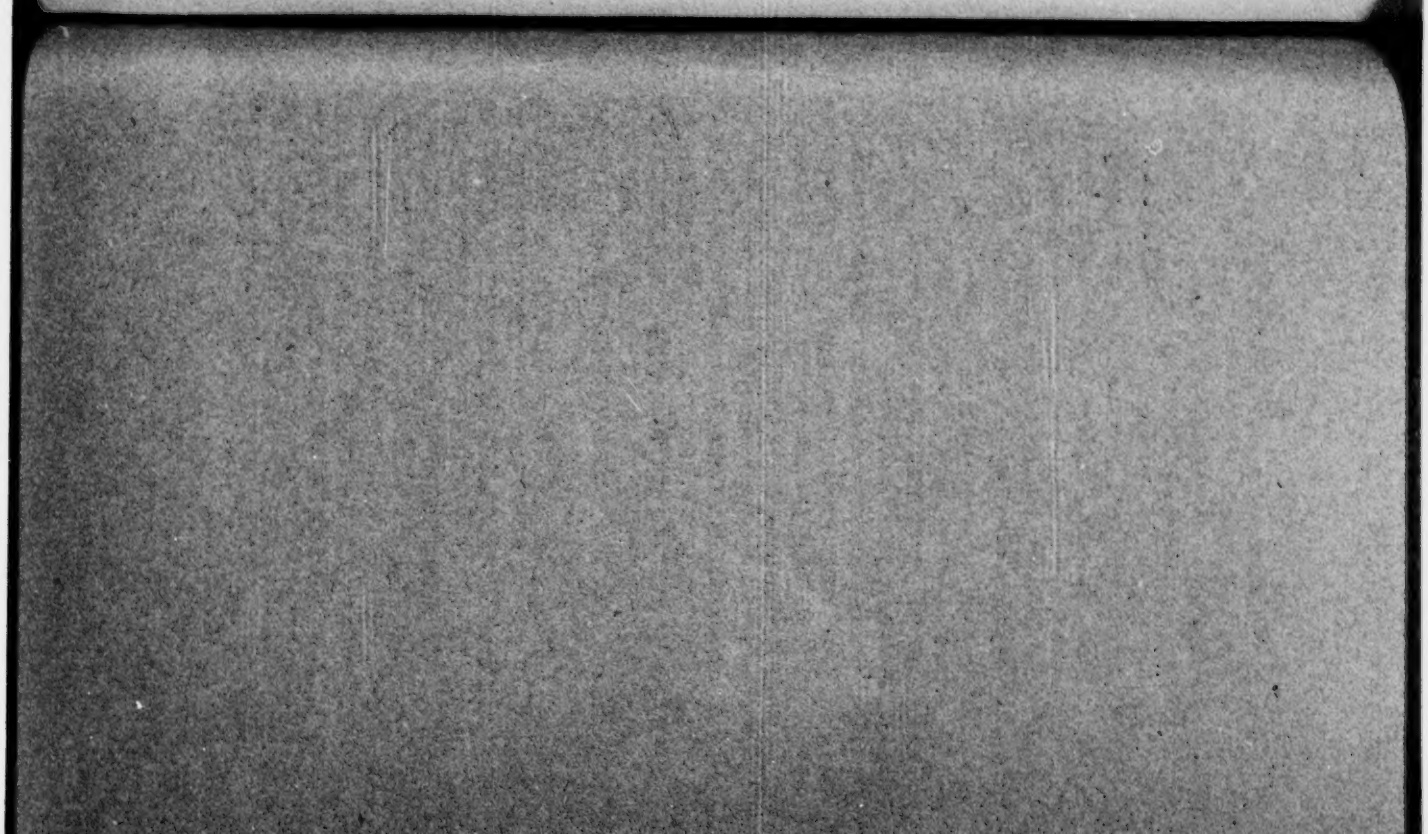
LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT IN ERROR, APPELLEE.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

Subject: Governmental visitation of railroad common carriers.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914



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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, BY James C. McReynolds, Attorney General of the United States, plaintiff in error, appellant,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, defendant in error, appellee.

No. 1087.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF CASE.

This proceeding was instituted by the district attorney of the United States for the Western District of Kentucky, under the direction of the Attorney General of the United States, at the request of the Interstate Commerce Commission, to obtain a writ of mandamus commanding the Louisville & Nashville Railroad Company to permit the Inter-

state Commerce Commission, through its examiners, to inspect and examine the accounts, records, and memoranda kept by said railroad, including the correspondence files and the indices thereto; that is, including letters received and copies of letters sent by said railroad and the indices to said letters and copies.

On November 6, 1913, the Senate of the United States adopted the following resolution:

> *Resolved,* That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable—
>
> First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;
>
> Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;
>
> Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they

would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad or any of its subsidiaries or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing, or tending to show, (*a*) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (*b*) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga and Saint Louis Railway by which the former uses the tracks of the said Western and Atlantic Railway restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing or tending to show, whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga, and Saint Louis Railway of any railroad terminals or terminal companies, steamboats, and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dockyard at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad

companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company, or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, all or any of them have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (*a*) The number of free annual passes; (*b*) the number of free-trip passes; (*c*) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred

and eleven, to members of legislative bodies and other public officials, or at the request of members of legislative bodies and other public officials; (*d*) the total mileage traveled upon free passes issued under each of the above classifications; and (*e*) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads.

The above resolution may be summarized as calling for information on the following points:

(*a*) The amount of stocks and bonds or other securities of the Nashville, Chattanooga & St. Louis Railway owned and controlled by the Louisville & Nashville Railroad.

(*b*) The facts tending to show whether the relations between the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Railroad are such as to restrict competition and maintain fixed *rates.*

(*c*) Whether the ownership of terminals at certain points, and steamship lines, by the Louisville & Nashville Railroad Company affects *rates by restricting competition.*

(*d*) Whether the elimination of competition among the interstate carriers specified has any relation *to the rates fixed by said carriers.*

(*e*) Information respecting the issuance of free passes.

On November 10, 1913, the Interstate Commerce Commission ordered that a proceeding of inquiry

and investigation be made into and concerning the several matters and things set forth and referred to in the Senate resolution. The order of the Commission is set out in full in the appendix to this brief.

In obedience to the Senate resolution, under and by virtue of the power of visitation conferred upon the Interstate Commerce Commission by the act to regulate commerce, special agents and examiners were duly authorized by the Commission to inspect and examine the accounts, records, and memoranda of the Louisville & Nashville Railroad. The railroad declined and refused to permit the examiners to have access to certain of its records; that is to say, the railroad refused to allow either the Interstate Commerce Commission or its examiners access to or opportunity to examine correspondence received by the railroad before, on, or subsequent to August 28, 1906, or copies of correspondence sent out by the railroad before, on, or subsequent to said date, or the indexes kept with respect to said outgoing and incoming correspondence by said Louisville & Nashville Railroad Company. The access to this correspondence was refused by the Louisville & Nashville Railroad Company principally upon the ground that the correspondence contained private and confidential communications between the railroad and its officers, and private and confidential communications be-

tween the various officers and agents of the railroad, and between the railroad and its attorneys. The railroad alleged further that the Commission had no authority to examine said correspondence under the act to regulate commerce, and if the act gives such authority it would be in violation of the search and seizure clause of the Constitution.

Whereupon the Interstate Commerce Commission applied to the District Court of the United States, Western District of Kentucky, for a writ of mandamus to compel the defendant to give the Interstate Commerce Commission, its agents and examiners, access to said records and papers.

On the 25th day of March, 1914, the court refused to grant the writ of mandamus and dismissed the petition without prejudice. Thereupon the United States applied for and obtained a writ of error from the Supreme Court of the United States, and appealed from the District Court of the United States for the Western District of Kentucky to the Supreme Court of the United States.

THE ANSWER.

The answer of the Louisville & Nashville Railroad Company to the petition for mandamus opposed the issuance of the mandamus for access to correspondence records, in substance as follows:

1. Because its correspondence files contain private, privileged and confidential communications between officers and agents of the railroad and between the railroad and its attorneys.

2. If the act to regulate commerce gives the Interstate Commerce Commission authority to obtain such access it would be in violation of the fourth amendment as to unreasonable search and seizure of private papers of the railroad.

3. Because the Commission has no power or jurisdiction under the act to regulate commerce to investigate and report upon the matters set out in the Senate resolution.

4. Because the Hepburn Act, which went into effect August 28, 1906, is not retroactive, and, even if effective prospectively, does not give the right of access to accounts and records made prior to that date.

OPINION OF THE LOWER COURT.

The lower court denied the mandamus on substantially the following grounds:

1. Because the correspondence sought to be examined might contain private and confidential communications between the railroad and its officers and agents, and privileged communications between the railroad and its attorneys.

2. Because the petition does not specify the correspondence sought to be examined, nor state its contents.

3. Because an exact description of the records and papers which are to be examined should be set out in the petition.

4. Because, in the opinion of the court, this proceeding was an effort to enforce a resolution of the United States Senate.

ASSIGNMENTS OF ERROR.

The court below erred:

I. In denying to plaintiff the writ of mandamus prayed for in the petition herein.

II. In adjudging that the petition of the plaintiff be dismissed without prejudice.

III. In considering the affirmative averments of the answer, which are controverted by force of the act to regulate commerce, and in support of which no evidence was introduced.

IV. In holding that communications between the attorney of a railroad company engaged in interstate commerce and other officers of such company are privileged as against the Government.

V. In holding that communications between officers of a railroad company engaged in interstate commerce are privileged and can not be examined by the Interstate Commerce Commission under the law.

VI. In holding that the correspondence of a railroad engaged in interstate commerce is not a part of the accounts, records, and memoranda of such railroad.

VII. In holding that a railroad engaged in interstate commerce is entitled to have any secrets as against its creator, the Government.

VIII. In holding that correspondence desired to be examined must be specified and its contents stated; as it is manifestly impossible to know what is contained in the correspondence until it is ex-

amined and the purpose of the examination must be to ascertain if the correspondence contains any matter germane to the investigation by the commission.

IX. In holding that a railroad engaged in interstate commerce may judge for itself what part of its correspondence it will permit the Interstate Commerce Commission to examine.

X. In holding that the provisions of section 20 of the act to regulate commerce as amended did not apply to accounts, records, and memoranda made previous to August 28, 1906.

ARGUMENT.

I.

A railroad company engaged in interstate commerce performs the functions of the state. It is a quasi-public corporation. The correspondence of such a railroad can not be private or personal and immune from the powers of visitation in the Government.

(A) The Louisville & Nashville Railroad Company objects to the Interstate Commerce Commission having access to its correspondence on the ground that such correspondence is *private*. How and when did the correspondence of the interstate railroad become *private*? How can the letters written by a railroad corporation be private? It is not the personal correspondence of the officials of the road that the Interstate Commerce Commission asks to examine, but the correspondence of the *rail-*

road. A railroad, like other corporations, can only act through its officials. Its correspondence is naturally conducted by its officials; nevertheless, it is the correspondence of the railroad and not the personal correspondence of the officials. The official of a railroad is a quasi-public official. His correspondence for the railroad is not in any sense private, but in its very nature subject to governmental visitation. The claim of the railroad that its correspondence is private is as remarkable as if the Secretary of Commerce, for instance, were to object to an examination of his official correspondence by a committee of the United States Senate on the ground that his *official correspondence* is *personal* and *private.* The business affairs of railroads are not the private concern of those who operate these carriers, but they take their charters subject to the right of visitation by the Government.

> The State is the visitor of all corporations founded by it for public purposes. *Words and Phrases,* IV, 1190.

At common law the right of visitation was exercised by the king as to civil corporations. (1 Cooley's Blackstone, 481.) In the United States the legislature is the visitor of all corporations created by it. (1 Cooley's Blackstone, 482. *Dartmouth College* v. *Woodward,* Wheaton 4, 583.)

Kent's Commentaries, Volume II, side page 301, thus defines the visitatorial power:

> If the corporation be public, in the strict sense, the government has the sole right, as

> trustee of the public interest, to inspect, regulate, control, and direct the corporation, and its funds and franchises, because the whole interest and franchises are given for the public use and advantage.

The Federal Government has the same power of visitation over corporations engaged in interstate commerce as a State has with respect to the franchises granted by the State. *Wilson* v. *United States,* 221 U. S. 384; *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322. *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541.

The Supreme Court through Mr. Justice Day in *I. C. C.* v. *Goodrich Transit Co.,* 224 U. S. 194, at page 215, said:

> It is argued that Congress has not visitorial power over state corporations. We need not reassert the ample power which the Constitution has been construed to confer upon Congress in the regulation of interstate commerce, declared in the many cases in this court from *Gibbons* v. *Ogden* to its most recent deliverances. In *Hale* v. *Henkel,* 201 U. S. 43, 75, while general visitorial power over state corporations was not asserted to be within the power of Congress, it was nevertheless declared as to interstate commerce that the General Government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by act of Congress.

In *Hale* v. *Henkel,* 201 U. S. 43, at page 75, the Supreme Court said:

> Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

The officials of the Louisville & Nashville Railroad hold corporate records and corporate correspondence subject to the corporate railroad duty. If the corporation were guilty of misconduct its officials could not withhold its papers to save it; and if the officials were implicated in violations of law they could not withhold the papers to protect themselves from the effect of their disclosures. This was said by Mr. Justice Hughes in the case of *Wilson* v. *United States,* 221, U. S., at page 384:

> The reserved power of *visitation* would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the

> personal rights they enjoy. They may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. But the *visitatorial* power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian. [Italics ours.]

(B) This power of visitation by the Government over corporations has, in the instance of interstate railroad carriers, been delegated to the Interstate Commerce Commission by the act to regulate commerce. This carries with it authority to the Commission to examine the records of such carriers. The correspondence of a common carrier is a part of its records and documents.

> The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books. *Wilson* v. *United States*, 221 U. S., at page 377.

(C) The Louisville & Nashville Railroad claims, and the court below held, that it can not be required to permit the Interstate Commerce Commission to examine the railroad correspondence because the correspondence includes communications

between the railroad and its attorneys. If the rule announced by the court below is the law, then all a railroad need do in order to defeat the power of visitation by the Interstate Commerce Commission under the act to regulate commerce would be to make attorneys its principal officers. The attorney of a railroad engaged in interstate commerce is a quasi-public official and the rule of evidence concerning privileged communications between attorney and client can not apply to defeat governmental visitation as to communications between a railroad and its attorneys. It could with equal force be argued that communications between the Attorney General and district attorneys on public business are privileged, or communications between any department of the Government and the attorney for such a department are privileged, as to insist that communications between a public-service railroad and its attorney are privileged and exempt from examination by the Government.

Railroads are governmental agencies; railroad officials are public officers; railroad records are not private records and can not be withheld from the public on grounds of private business; railroad attorneys are not *private* attorneys; their communications are not clothed with that privilege that would attach to a communication between an attorney and a private client. Over and above all is the right and power of the Government as the visitor to see all. Mr. Justice Bradley in a dissenting opinion in *Wabash, St. Louis and Pacific Railway*

Company v. *Illinois,* 118 U. S. 557, at page 586, expressed what is now the accepted doctrine:

> The highways of a country are not of private but of public institution and regulation. In modern times, it is true, government is in the habit, in some countries, of letting out the construction of important highways, requiring a large expenditure of capital, to agents, generally corporate bodies created for the purpose, and giving to them the right of taxing those who travel or transport goods thereon as a means of obtaining compensation for their outlay. But a superintending power over the highways, * * *, always remains in the Government.

These propositions find support in *Railroad Company* v. *County of Otoe,* 16 Wall. 667, at page 673, as follows:

> The State may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a State legislature or to some law that authorized a municipal division of the State to construct and maintain them at its own expense. *They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways.* And that authority given to a mu-

> nicipal corporation to aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the States have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times. It is no longer open to debate. [Our italics.]

A leading case on the subject is *Olcott* v. *The Supervisors*, 16 Wall. 678. The precise point is stated at page 691. The court said:

> That the State might itself make such an improvement, and impose taxes to defray the cost, or exercise its right of eminent domain therefor, was beyond question. Yet confessedly it could neither take property or tax for such a purpose, unless the use for which the property was taken or the tax collected was a public one. And it was also the undoubted law of the State *that building a railroad* or a canal *by an incorporated company was an act done for a public use,* and thus the power of the legislature to delegate to such a company the State right of eminent domain was justified. [Italics ours.]

On page 695 of the Olcott case the court said:

> Whether the use of a railroad is a public or a private one depends in no measure upon

the question who constructed it or who owns it. *It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State.* [Italics ours.] Though the ownership is private the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris.* The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. *Charles River Bridge Co.* v. *Warren*, 7 Pick. 495. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge. Cooley's Const'l Limitations.

In *Louisville & Nashville R. Co.* v. *Kentucky*, 161 U. S. 677, at page 696, it was said:

> There was a difference of opinion in the court as to whether this language applied to elevators in such manner as to empower the legislature to fix their charges; but it has been too often held that railways were public highways, *and their functions were those of the State* [italics ours], though their ownership was private, and that they were subject

to control for the common good, to be now open to question. It was so expressly stated in *Olcott* v. *Supervisors,* 16 Wall. 678, 694.

In *Smyth* v. *Ames* (the Nebraska Rate case), 169 U. S. 466, at page 544, the court said:

> A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. *Such a corporation was created for public purposes. It performs a function of the State.* [Italics ours.] Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. (*Olcott* v. *The Supervisors,* 16 Wall. 678, 695; *Sinking Fund Cases,* 99 U. S. 700, 719; *Cherokee Nation* v. *Southern Kansas Railway,* 135 U. S. 641, 657.) It can not, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests and ignore the rights of the public.

In *Wisconsin, Minnesota and Pacific Railroad* v. *Jacobson,* 179 U. S. 287, at page 296, it was said:

> Railroads have from the very outset been regarded as public highways, and the right and the duty of the Government to regulate in a reasonable and proper manner the conduct

> and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the Government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions.

The case which has reviewed all these opinions, *Donovan* v. *Pennsylvania Company,* 199 U. S. 279, states the following, page 292:

> Much has been said in argument as to the functions and duties of railroad companies. Under the decisions of this court, there can be no doubt as to the nature of those functions or duties. In *New Jersey Steam Navigation Co.* v. *Merchants' Bank* (6 How. 344, 382) this court held that a corporation engaged, under legislative authority in the transportation of passengers and freight over navigable waters, was " in the exercise of a sort of public office and has public duties to perform." In *Olcott* v. *The Supervisors,* 16 Wall. 678, 694, 695, it was adjudged that a railroad, whether constructed by a private corporation or by individuals under the authority of a legislative grant, or by the State itself, was a public highway, and that the function performed by the corporation was that of the State, and the uses to which its property was devoted were of a public nature. In *Queensbury* v. *Culver,* 19 Wall. 83, 91, it was said that the con-

> struction or maintenance of a public highway was "for the promotion of a public use." So in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 676, which involved the validity of taxation under legislative authority to aid in the construction of a railroad by a corporation: "Though the corporation was private, its work was public, as much so as if it were to be constructed by the State."

In *C. B. & Q. Ry.* v. *Drainage Commissioners* (200 U. S. 561, at page 588) the court declared:

> It has been so often said that it need only be adverted to here, that corporations such as appellant (railroad) do not hold their property and exercise their franchises strictly in a private right, but from the nature of their business and their relation to society they are public corporations in a sense and are subject to public control and regulation. * * *

Records consisting of books, papers, and correspondence in the possession of officials of railroads exercising prerogatives under grants by the Government and existing under governmental franchises are in their possession as public agents, and they are subject to the right of the public to examine them, through the official representatives of the public.

(D) By section 12 of the act to regulate commerce the Commission is authorized and required to inquire into the management and business of all

common carriers subject to the provisions of the act and keep itself informed as to the manner and methods in which the business is conducted, and to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created. How is the Commission to keep itself informed as to the manner and method in which the business of a common carrier is conducted? Certainly by examination of its books and records. The business of a common carrier is evidenced by its books and papers, including its correspondence. Indeed, in many instances the only account existing of the transactions of a carrier is contained in letters written by or to the carrier. The application of tariffs is, for instance, often construed by correspondence between the general officers and the local officers of the carriers. If unlawful agreements between carriers as to pooling of freight or division of territory exist, they would generally be evidenced by correspondence rather than by book entries. The entries in the books alone might be misleading, or give little light. Full information can be obtained only by examination of all books, papers, and documents, including correspondence. If the Commission is denied access to correspondence it would be impossible for it to inform itself fully as to the business conducted by the carrier. Suppose the funds of the carrier are dissipated in campaign

contributions or in the securities of other companies. These items might be placed upon the books, and often are, in such a way as to give little information, and the illumination afforded by the correspondence is necessary in order to furnish complete knowledge. Could an examiner of a national bank fully inform himself as to the business conducted by the national bank without access to the correspondence of the bank? Suppose a national bank should take the position that its correspondence is *private* and that the letters between itself and its attorneys are *privileged*. We do not believe that any court would sustain such an attitude.

The power of visitation conferred upon the Commission by the act to regulate commerce is not a strange or unknown power, nor is it a power exercised by the Government only with reference to railroads. For a long period of time it has been the practice of both the State and National Governments to require businesses, trades, and occupations to make reports of such a nature and submit to examination their business papers and the conduct of their business evidenced by their books, papers, and records. Such examinations are familiar as relating to the business of banking, insurance, distilling, tobacco, oleomargarine, and the collection of revenue. The new Federal Trade Commission is a recent example of the delegation by Congress of the power of visitation over corporations engaged in interstate commerce other than common carriers.

Corporations have no rights but legal rights. They can not assert any rights or privileges except those granted them by law. They have no legal right to secrecy as against the Government. The law does not confer upon them the privilege of concealing their papers from the searchlight of the Government. The provisions of sections 12 and 20 giving the Commission visitatorial power as to books, papers, and memoranda of railroads are parts of the charter of every railroad, for all such charters are subject to the laws of the land. A corporation, a creature of the law, is bound to the law by the ties of its creation and its being. By accepting the act of incorporation it undertakes to perform all public duties and assumes all obligations required by it. A railroad can not claim any vested right to secrete its correspondence from the eyes of its creator—the Government.

(E) Ordinarily, corporations engaged in interstate commerce are created by the laws of the States, and the power of regulation and control, to which the power of visitation is ancillary, is prescribed in great detail in the State laws. Every act done or transaction had by the corporation must be open and fully disclosed to the State upon request. In *Hale* v. *Henkel,* 201 U. S., page 74, the court said:

> Upon the other hand the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and

> franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporation books and papers for that purpose.

As has been pointed out above (p. 13), the authority of the Federal Government to enact laws for the *visitation*, regulation, and control of corporations engaged in interstate commerce is as full and complete as the power of a State to enact such laws within the limits of its territory. Under and by virtue of the power given to Congress over interstate commerce by the Constitution the national lawmaking body has, by express enactment, conferred the power of visitation upon the Interstate Commerce Commission as to all railroads engaged in interstate commerce. Section 11 of the act to regulate commerce created and established

the Interstate Commerce Commission, and section 12 invested the Commission with power and—

> authority to inquire into the management of the business of all common carriers subject to the provisions of this act. * * *

Section 13 provides—

> the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act.

Section 20 of the act provides for reports to be made annually to the Commission by all common carriers subject to the act, and the Commission may require—

> from such carriers specific answers to all questions upon which the Commission may need information. * * * Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or

contracts affecting the same, as the Commission may require. * * * The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. *The Commission shall at all times have access to all accounts, records, and memoranda kept by the carriers subject to this Act* [italics ours], and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. * * * In case of failure or refusal on the part of such carrier * * * to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier * * * shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense * * * provided that the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be

destroyed, and prescribe the length of time such books, papers, or documents shall be preserved.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission, or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term of not exceeding two years, or both.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate Commerce, or of any Act supplementary thereto or amendatory thereof by any common carrier, *to issue a writ or writs of mandamus* [italics ours] commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

Section 21 provides that the Commission shall make an annual report to Congress.

This report shall contain such information and data collected by the Commission as may

> be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary;

(*a*) In fact, the law employs such comprehensive language in describing what may be examined, that every paper which contains any note or transaction of the defendant must be exhibited if called for. To permit the defendant to withdraw any part of its records from the scrutiny of the visitorial power would defeat the investigation; to exempt a part of the records, *letter files,* and *correspondence* from examination would enable the defendant to conceal its transactions in its letter files and render the act of Congress a nullity. No exception was made in the statute as to visitation of letter files or even privileged communications. The visitatorial power is absolute.

The authority of the Interstate Commerce Commission in carrying out its duties under the act is well expressed in the *Brimson* case, 154 U. S. 447, at page 471, quoting from *Gibbons* v. *Ogden,* the court said:

> This power (to regulate commerce), like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * *

Continuing, at page 472, the court said:

> The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the act, *and to investigate the whole subject of interstate commerce as conducted by such carriers, and in that way to obtain full and accurate information of all matters involved in the enforcement of the act of Congress.* [Italics ours.] It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. * * * Interpreting the interstate commerce act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled

principle of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that one exception." 4 Wheat. 316, 409. The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. *The judiciary can only inquire whether the means devised in the execution of the power granted are forbidden by the Constitution. It can not go beyond that inquiry without entrenching upon the domain of another department of the Government.* [Italics ours.] *Sinking Fund cases,* 99 U. S., 700, 718.

An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the sub-

> ject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information *but of compelling by all lawful methods obedience to such rules.* [Italics ours.]

In *Wilson* v. *United States,* 221 U. S., 361, the court was speaking of an ordinary corporation. With how much added force must the visitatorial power be considered in reference to quasi-public corporations such as railroads. The court, through Mr. Justice Hughes, at page 377, said:

> For there can be no question of the character of the books here called for. They were described in the subpœna as the books of the corporation, and it was the books so defined which, admitting possession, he withheld. *The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books.* [Italics ours.] It was said in the appellant's statement before the grand jury that the books contained copies of his "personal and other correspondence as well as copies of the correspondence relating to the business and affairs" of the cor-

poration. But his personal letters were not demanded; these the subpœna did not seek to reach; and as to these no question of violation of privilege is presented. Plainly he could not make these books his private or personal books by keeping copies of personal letters in them. Had the appellant merely sought to protect his personal correspondence from examination it would not have been difficult to have provided, under the supervision of the court, for the withdrawal of such letters from scrutiny. Indeed, on the hearing of the second presentment, the court suggested their removal from the books. But the appellant was not content with protection against the production of his private letters; he claimed the privilege to withhold the corporate books and the documents which related to corporate matters and with respect to which he had acted in his capacity as the executive officer of the corporation. And that is the right here asserted. * * *

Continuing at page 382:

What then is the status of the books and papers of the corporation, which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in

a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporation organization. *But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books.* [Italics ours.] That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-crimination. Although the object of inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, *it must submit its books and papers to duly constituted authority when demand is suitably made.* [Italics ours.] This is involved in the reservation of the *visitatorial* [italics ours] power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.

Proceeding with the opinion in *Wilson* v. *United States, supra,* page 384, the court said:

> The reserved power of *visitation would seriously be embarrassed* [italics ours], if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. * * * *But the visitorial* [italics ours]

power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.

In *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, at page 348, the Supreme Court, through Mr. Justice White, said:

> We say this because it was in that case (*Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541) determined in view of the *visitorial* [italics ours] powers of a State over corporations doing business within its borders and the rights of the State to know whether the business of a corporation was being carried on in a lawful maner, that it was competent for the State to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the State had been complied with. And of course such power embraces the authority to require the giving of testimony by the officers, agents and other employees of the corporation for like and analogous purposes. * * * As these subjects were within the scope of the *visitorial power* [italics ours] of the State and concerning which it had the right to be fully informed, the mere incident or purpose for which the lawful power was exerted affords no ground to deny its existence. In *Consolidated Rendering Co.* v. *Vermont,* the books and papers were required for an investigation before a grand jury concerning *supposed misconduct of the corporation.*

> [Italics ours.] The power to compel the production to ascertain whether wrong had been done, in the nature of things, as the greater includes the less, is decisive as to the right to exact the production for the purpose of proof in a pending cause. * * *

(*b*) The point made by the defendant that the papers sought by the Commission are privileged communications, can not be sustained for the further reason that the practice of withholding proofs on this ground is simply a rule of evidence found to be expedient in judicial proceedings in certain instances, and has no application to the exercise of the power of visitation by the Government. There can be nothing withheld by carriers engaged in interstate commerce from examination by the Government. There can be no secrets. There can be no confidences not reposed in the sovereign. The creator, under its express power of visitation, has unrestrained access to all the papers, records, documents, and transactions of its interstate carriers.

(F) The act to regulate commerce is remedial in its nature, and will, therefore, be construed by the court in a manner which will accomplish the purpose the framers of the act had in view, if such construction will not conflict with the plain import of the language employed. By the act Congress intended to prevent common carriers engaged in the transportation of persons and property in interstate commerce from exacting unreasonable

rates of transportation; from unjustly discriminating between different persons by the application of special rates, by the payment of rebates, drawbacks, or by other devices; from giving one person, place, or description of traffic undue and unreasonable preference and advantage, and subjecting another person, place, or description of traffic to undue and unreasonable prejudice and disadvantage; from pooling of freight by different competing railroads, or dividing between them the net proceeds of the earnings of such railroads, or any portion thereof, and to prevent departure by any means whatsoever from the rates and charges which such carriers are by the provisions of the act required to publish and file with the Interstate Commerce Commission. The Interstate Commerce Commission was created to enforce the provisions of this act. By section 12 of the act it is provided:

> That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act. * * *

It is therefore entirely clear that the Congress intended to authorize the Commission through its agents and examiners to inform itself fully concerning all business done by common carriers subject to the act and compare the information thus obtained with the information given in reports made to the Commission from time to time by the carriers through their own officials. It follows that it was the purpose of Congress to give the Commission access to every piece of paper or document which might throw light upon the business done by the carrier. The contention that letters received and copies of letters forwarded by the carrier would not afford any light upon the business of the carrier would be entirely contrary to common knowledge and the common experience of mankind. This conclusion is emphasized by the provisions of section 20, which is a part of the Hepburn Act which went into effect August 28, 1906. A portion of section 20 referred to, reads:

> The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. *The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act.* * * * [Italics ours.]

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It is contended by counsel for the defendant in error that this section only gives the Commission power to examine accounts, records, and memoranda for which it prescribes the form. This contention, however, leaves out of consideration the plain wording of the section, which makes it discretionary on the part of the Commission to prescribe the forms. Suppose the Commission had not prescribed any forms? Could it be fairly concluded that, therefore, the Commission would have access to no accounts, no records, and no memoranda of the carrier? The Commission might prescribe the form in which correspondence should be preserved and the forms of indices thereto. The fact that it has not prescribed such forms would not preclude it from access to indices kept by the carrier, or the correspondence, any more than failure on the part of the Commission to prescribe the form of books and accounts kept by the carrier would prevent the Commission from examining such books as might be kept by the carrier. The Commission might prescribe the form of preserving correspondence—whether in carbon copies, letterpress copies, or some other form. This the Commission has not done because it has evidently not seemed necessary. By what process of reasoning can it be assumed that the Commission has therefore forfeited the power of visitation conferred by the act to regulate commerce? May the carrier conceal from the Government all of its business transactions except those

shown in the forms of record prescribed by the Commission? It manifestly was not the intention of Congress to confine the authority of the Commission to the accounts, records, and memoranda kept in such form as the Commission has prescribed or may prescribe.

In section 20 the following proviso appears:

> *Provided,* That the Commission may, in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

This clearly shows that Congress intended to include documents in the term "accounts, records, and memoranda," and the Supreme Court of the United States has, as we have indicated above, held that copies of letters are documentary property. *Wilson* v. *United States,* 211 U. S. 361.

It would, indeed, be a strange anomaly if the Commission, having the power under the proviso of section 20 to order books and papers, including correspondence, *destroyed,* had no power to *examine* the correspondence. The fact that the Commission may prescribe the length of time that documents shall be preserved indicates that there must have been some purpose in the mind of Congress in preserving such documents or correspondence. Within the time so prescribed the carrier may not lawfully destroy

such documents or correspondence. Why should such documents or correspondence be preserved for the length of time prescribed by the Commission? The only reason could be for the purpose of inspection. Inspection by whom? Necessarily by the Interstate Commerce Commission through its examiners and agents. This conclusion would seem to be irresistible.

(G) If the Interstate Commerce Commission is denied, or has no authority under the act to see correspondence, then its power of visitation into the business of carriers would be largely nullified. Such business as the carrier might desire to keep from the knowledge of the Commission could be secreted in its correspondence. If any class of correspondence is exempt from examination by the Commission, then all matters desired to be concealed from the Government by the carrier could be placed in the privileged class. The power of visitation given by sections 12 and 20, to be effective, must be unlimited as to all of the accounts, records, and memoranda of the carrier, including its correspondence.

While the statute authorizes the Commission, *in its discretion,* to prescribe the forms of " any " and " all " accounts, records, and memoranda " *to be* kept," in the future, it grants the Commission access *at all times* to " *all* accounts, records, and memoranda *kept,*" that is, actually kept, whether in prescribed form or not, and then makes it unlawful

for such carriers "to keep any other accounts, records, or memoranda than those prescribed *or approved* by the Commission." This contemplates that some may have been prescribed; others, not prescribed, may be approved.

It then authorizes the Commission "to employ special agents or examiners who shall have authority under order of the Commission to inspect and examine *any and all accounts, records, and memoranda kept* by such carriers." How is the Commission to ascertain whether any carrier has committed the act here made unlawful of keeping *any* other accounts, records, and memoranda than those prescribed or approved by the Commission, if its examiners have no access except to those kept in the form "prescribed"? Or, again, how can the Commission "*approve*" what it has not seen?

The statute then fixes a forfeiture of $500 for failure or refusal to *keep* such accounts, records, and memoranda *in the manner prescribed* by the Commission. This forfeiture could not be collected in cases where no manner had been prescribed.

It further fixes like forfeiture for failure or refusal "to submit such accounts, records, and memoranda *as are kept*," without qualification in respect of the manner or form of keeping, "to the *inspection* of the Commission or any of its authorized agents or examiners."

Thus far the statute deals with the carrier and not with the individual acting for the carrier.

In the following paragraph, however, it stamps as criminal certain acts of such individuals. It provides that any person who—

> (*a*) " shall willfully make any false entry in the accounts of *any* book of accounts, or in *any* record or memoranda kept by a carrier,"

without qualification as to the form or manner *prescribed,* or *approved,* by the Commission; or—

> (*b*) " shall willfully neglect or fail to make full, true, and correct entries in *such* accounts, records, or memoranda "—

viz, those actually *kept*—

> " of all facts and transactions appertaining to the carrier's business "—

again without qualification as to the form or manner prescribed by the Commission; or—

> (c) " shall keep any other accounts, records, or memoranda than those prescribed *or approved* by the Commission—"

shall be deemed guilty of a misdemeanor and subject, upon conviction, to a fine ranging from $1,000 to $5,000, or imprisonment for a term ranging from one to three years, or to both such fine and imprisonment.

The making of false entry in accounts, records, and memoranda *actually kept,* the failure to make full, true, and correct entries therein, and the *keeping* of any other accounts, records, and memoranda than those prescribed or approved by the

Commission, are separate offenses, but of equal gravity, and bear the same penalty; that is, when the Commission has prescribed or approved the form of records or memoranda, no other may lawfully be kept, but the carrier obviously may as a matter of fact keep records or memoranda which are neither prescribed nor approved and which cannot be approved or disapproved until seen. The *access* of the Commission is to *all,* whether prescribed or not prescribed, whether approved or not approved.

II.

The examination of the correspondence of a railroad engaged in interstate commerce can not be an unreasonable search or seizure, for the constitutional provision regarding search and seizure applies only to private papers, while documents of a railroad engaged in interstate commerce are subject at all times to governmental visitation.

In the case of *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, Mr. Justice Day, in disposing of the contention that to require Baird to appear before the Interstate Commerce Commission and produce certain papers amounted to an unreasonable search and seizure, said at page 46:

> Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure.

Again, the court said, page 45:

> The origin and interpretation of the Fourth Amendment to the Constitution, securing immunity from unreasonable searches and seizures, was fully discussed by Mr. Jus-

> tice Bradley in the leading case of *Boyd* v. *United States,* 116 U. S. 616. In that opinion the learned Justice points out the analogy between the Fourth and Fifth amendments, and the object of both to protect a citizen from compulsory testimony against himself which may result in his punishment or the forfeiture of his estate, or the seizure of his papers by force, or their compulsory production by process for the like purpose.

An officer of a corporation can not plead the criminality of the corporation as an answer to a demand for the inspection of the papers of the corporation; no more may an officer of an interstate railroad plead, in answer to a demand for the inspection of the papers of the railroad, that such inspection would be an unreasonable search and seizure of the papers of the *corporation. Private* papers are not involved, only *corporate* papers.

In *Hale* v. *Henkel,* 201 U. S. 75 (l. c.) the court said:

> The defense amounts to this: That an officer of a corporation, which is charged with the criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand

when charged with an abuse of such privileges.

In *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, at page 553, it was held that:

> The objection that the notice authorized by the statute amounted to an unreasonable search and seizure of the private books and documents of the company is also not well founded.

In *Wilson* v. *United States,* 221 U. S. 376, it was said:

> There is no unreasonable search and seizure when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced.

In *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 347, the question that the order to produce was so general and indefinite as to amount to an unreasonable search and seizure is referred to, and the court held that in view of the visitorial power of the State over corporations and the right of the State to know whether the business of a corporation was being carried on in a lawful manner that it was competent for the State to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the State had been complied with, and in such cases the charge of an unreasonable search and seizure could not be sustained.

In *Wilson* v. *United States,* referred to above, 221 U. S., at page 380, the question under consideration was whether the production of letterpress copy books of a corporation would be enforced for inspection and examination by a grand jury. After showing that the production of public records and official documents may be enforced, the court said:

> The principle applies not only to public documents in public offices, but also to records *required by law to be kept* in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, can not be maintained.
>
> * * * Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the *visitorial* power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress. [Italics ours.]

In *Wheeler* v. *United States,* 228 U. S. 478, it was held:

> Books of a corporation are not the private books of any of the officers and do not be-

> come so by the dissolution of the corporation and the transfer of the books to one of such officers.

In *Grant* v. *United States,* 227 U. S. 74, the court, through Mr. Justice Hughes, held:

> Professional privilege does not relieve an attorney from producing under subpœna of the Federal grand jury books and papers of a corporation left with him for safe-keeping by a client who claimed to be owner thereof.
>
> Notwithstanding a corporation ceases to do business and transfers its books to an individual, the books retain their essential character and are subject to inspection and examination of the proper authorities and there is no unreasonable search and seizure in requiring their production before the grand jury in a Federal proceeding.

There can be no communications privileged as against the Government respecting the business of public carriers. In *Adams* v. *New York,* 192 U. S., at page 598, the Supreme Court declared:

> The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of *private security* in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. [Italics ours.]

The search and seizure clause of the Constitution can not be invoked to prevent the visitatorial power of the Government being exercised as to the papers and documents of quasi-public corporations.

In *Hale* v. *Henkel,* 201 U. S. 43, the court, after laying down the principles of law we have quoted in this brief, held the subpœna under the peculiar facts of that particular case was too broad. That case is easily distinguishable from the case at bar. *Hale* v. *Henkel* was a *criminal* proceeding before the grand jury under the *Sherman Antitrust Act,* and subpœnas *duces tecum* had been issued to compel the witness to produce a mass of papers that could not be produced without stopping the business of the company.

Under the circumstances of that case the subpœnas were held to be too general and within the unreasonable search and seizure provision. This is a different proposition from that under discussion in the case at bar which involves the *visitatorial* power of the Government over common carriers delegated to the Interstate Commerce Commission.

Though the Federal Government possesses the power to regulate ordinary corporations engaged in interstate commerce, no specific *visitatorial* power has, until recently, been conferred upon any official body for this purpose, while, on the other hand, express visitatorial, investigating, and regulating power over *railroads* engaged in interstate commerce has been vested in the Interstate Commerce

Commission, and the law imposes upon that body a positive duty to give effect to these several purposes. Congress has authorized the agents of the Commission to examine the corporate books in question, and has ordered that the common carrier corporations shall give access to their papers and records to such examiners, which had not been done in connection with the Sherman antitrust law, under which Hale was being proceeded against. The court said in that case:

> Of course in view of the power of Congress over interstate commerce to which we have adverted we do not wish to be understood as holding that an examination of the books of a corporation, *if duly authorized by act of Congress*, would constitute an unreasonable search and seizure within the fourth amendment.

III.

The Commission is seeking only such information from the records and correspondence of the carrier as it has authority to obtain by the act to regulate commerce.

The matters set out in the Senate resolution are all within the visitorial power conferred by Congress upon the Interstate Commerce Commission. The Senate resolution in substance directed the Commission to investigate (1) the amount of stocks and bonds or other securities of the Nashville, Chattanooga & St. Louis Railway owned and controlled by the Louisville & Nashville Railroad

Company; (2) the facts tending to show whether the relations between the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Railroad Company are such as to restrict competition by the maintenance of fixed freight and passenger rates; (3) whether the ownership of terminals at certain points connecting with steamship lines by the Louisville & Nashville Railroad Company affects freight and passenger rates by restricting competition; (4) if there has been an elimination of competition among the interstate carriers specified as a result of the rates charged by said carriers; (5) information respecting free passes for the transportation of passengers by the carriers named.

It is obvious that the subjects named in the Senate resolution are all expressly covered by the act and specifically placed under the jurisdiction of the Commission. Sections 13 and 15 authorize the Commission to make such orders as it may think proper after a full hearing in a general investigation had upon its own initiative. Not only is the Commission fully authorized to conduct an investigation such as this, but in the Commission resides the ultimate and exclusive power to make any orders that may be appropriate to meet the exigencies of the situation. The subjects of investigation stated in specification 1 are cognizable by the Commission under sections 1, 5, 6, 13, 14, and 15 of the act to regulate commerce which cover investigations concerning the reasonableness of charges

for transportation, the pooling of freight, and the maintenance of established rates. The subjects referred to in specifications 2, 3, and 4 are embraced in section 5 of the act, and specification 5, relating to free passes, is covered by section 1 of the act. The fact that some of the matters set out in said resolution might involve violations of the antitrust law in no way destroys the jurisdiction of the Commission with respect to these same subjects. In view of the purpose for which the Commission was created and the express powers delegated to it by the act to regulate commerce, the jurisdiction of the Commission over the matters set out in the Senate resolution is apparent.

The suggestion was made, in the opinion of the court below, that the resolution of the Senate is not law, and can not be construed to supplement the powers of the Commission, and that such powers are inadequate for the present proceeding.

It is respectfully submitted that the Commission needs no aid to its powers to investigate the matters referred to in the Senate resolution. The authority to investigate matters affecting interstate transportation has been expressly conferred by the act to regulate commerce, and this power has been declared constitutional and has been recognized and applied in numerous cases.

The resolution of the Senate has direct and specific reference to the maintenance of the published rates, charges for transportation, competitive methods, the pooling of freight, and issuance

of free passes. The purpose being to discover and bring to light methods, devices, or practices that affect the charges made by the railroads for transportation or that produce discriminations or preferences or that result in any violation of the act.

The Interstate Commerce Commission has a broad and absolute jurisdiction to investigate matters of this nature. One of the purposes of its creation was to perform services of this character and to suggest remedies for the evils discovered. Its remedial and beneficial character has led the courts to construe the terms of the act liberally and to widen its scope and to free it from narrow application and technical objections.

(A) The Harriman case, 211 U. S. 407.

The questions propounded to Harriman and Kuhn related to their *private* ownership of stocks. There is no analogy, helpful to the defendant, between the Harriman case and the proceeding under review. The Harriman case was decided upon the theory that it involved the *private* affairs of a private individual, the present case is clearly that of a *public-carrier corporation* over which the Government has the most complete visitatorial powers. *We have here no question of evidence, or of production of evidence in court. It is a question of the right to inspect regardless of the evidential value of the papers inspected.* Moreover, the Commission is in the instant case investigating matters which might have been made the subject of complaint, in which event the Harriman case is authority for compelling the production of the evidence desired. The mat-

ters stated in the resolution might have been made the object of complaint under various sections of the act, namely, reasonableness of the rates of the defendant and the free-pass provision of the first section, the pooling of freight of different and competing railroads, and the ownership or control of competing water lines under section 5, and the maintenance of the established rates under section 6, all of which matters the Commission is not only empowered to investigate, but is charged with the duty of investigating without regard to any authority conferred by the Senate resolution.

With respect to the power of the Commission under section 20, the court in the Harriman case said, page 421:

> The only other section that is thought to sustain the argument for the commission is section 20, amended by act of June 29, 1906. This authorizes the commission to require annual reports from all the carriers concerned, with details of what is to be shown, to which the commission may add in certain particulars, and, further "to require from such carriers specific answers to all questions upon which the Commission may need information." The commission may require certain other reports, and is to have *access to all accounts, records, and memoranda.* The section now deals at length with this matter and how accounts shall be kept and the like. It seems to us plain that it is directed solely to accounts and returns *and is imposing a duty on the common carrier only from whom the returns come.* [Italics ours.]

Here the court by plain inference states that section 20 imposes a duty upon the carrier to give the Commission access to all accounts, records, or memoranda. This is the duty sought to be enforced in this proceeding.

In the Harriman case the court had under consideration the constitutional rights of the *individual,* while in this case we are dealing with the functions performed by the Commission under its visitatorial powers over *railroad corporations.*

IV.

The Commission has authority to obtain through its agents or examiners full and complete information concerning all business done by a common carrier subject to the provisions of the act to regulate commerce, even though some of that business should not be within the regulatory power of the Commission.

While it seems quite clear that all of the subjects covered by the Senate resolution are plainly within the jurisdiction of the Commission under the act, the Commission would still have jurisdiction even if some of the matters were beyond its regulatory power.

The cases of *Interstate Commerce Commission* v. *Goodrich Transit Company,* and *United States* v. *White Star Line,* 224 U. S. 194, involved orders of the Commission requiring the appellees, which were common carriers subject to the act, to keep certain of their accounts in accordance with forms prescribed by the Commission, and to make reports to the Commission which should include all the

business done by them, notwithstanding that more than eighty per cent of the revenues of the Goodrich Transit Company and more than ninety-nine per cent of the revenues of the White Star Line were derived from business not within the regulatory power of the Commission (ib. 204). In holding the orders to be within the power of the Commission, the Supreme Court, in its opinion submitted through Mr. Justice Day, called attention to the authority conferred upon the Commission by section 20 of the act, and then said, page 211:

> We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to

the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission and has been the subject of great consideration. It caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them.

The fact, therefore, that some of the business covered by the Senate resolution or by the letters

and copies of letters in question may not be within the *regulatory* power of the Commission can not defeat the *visitatorial* power of the Commission.

V.

The Commission, under the visitatorial power conferred upon it by the act to regulate commerce, may examine the records of the correspondence prior to August 28, 1906, as well as subsequent thereto, the date mentioned being the date the Hepburn Act became effective.

The Commission has power to examine the records of a carrier under the visitatorial authority conferred by section 12, irrespective of the provisions of the Hepburn Act contained in section 20. Section 12 is a part of the act enacted in 1887, while the portion of section 20 under consideration is a part of the Hepburn Act, which became effective August 28, 1906. Even if we assume that the visitatorial power of the Commission depends upon the Hepburn Act, that act would give authority to the Commission to examine the records of the carrier both prior to and subsequent to the passage of the act, there being no vested right in the carrier of keeping its records secret from the Government. The doctrine of retrospective operation of laws has no application in this case. There is no question involved of impairing a vested right or imposing a new duty, or attaching a new disability in respect to transactions or considerations already past. Laws effecting remedies are not within the scope of retrospective laws. En. U. S. Sup. Court, Vol. 4, pp. 432, 442, and cases cited.

VI.

Mandamus is the proper remedy to enforce the visitatorial power of the Commission.

The lower court in disposing of the case proceeded upon the idea that the writ of mandamus was employed to enforce the resolution of the Senate, whereas the writ (which was expressly given by statute for the purpose) was used by the Commission to aid it to carry out and give effect to the provisions of the act to regulate commerce. It became the duty of the Commission, under section 12, to execute and enforce the provisions of the act; and the same section says, "And upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act." Section 20 provides that the district court may issue a writ of mandamus commanding the common carrier to comply with the provisions of the act. The defendant having refused to comply with the provisions of the act by denying access to its records, it was the duty of the Commission to apply for the writ. The Commission was not endeavoring to enforce the Senate resolution as such by the writ of mandamus, but it was employing this writ under the authority of the act to regulate commerce to carry out a solemn duty imposed upon the Commission.

The court further says that the "resolution under no admissible interpretation relates to interstate commerce as regulated by the act." We have shown elsewhere in this brief that every specification of the Senate resolution relates to interstate commerce as regulated by the act.

The court further holds that the granting of the writ is always a matter of sound discretion, and because of the grave doubts that exist as to the question of privileged communications, the retrospective operation of the law, the vague allegations of the petition, and the court's inability to clearly define the duty the writ would impose, it seemed to the court that the writ should be denied and the action dismissed.

While granting the writ has been said to be a matter of sound discretion, this does not mean that it is an arbitrary matter with the judge, but it means judgment according to law based upon the facts of each case; that discernment which enables a person to judge critically of what is correct and proper; when applied to a court of justice it means sound discretion guided by law. It must be governed by rule, not by caprice. It must not be arbitrary, vague, and fanciful, but legal and regular. *Words and Phrases,* vol. 3, p. 2045. In the case of *Osborne* v. *United States Bank,* 22 U. S. 865, Chief Justice Marshall, speaking for the court, said:

> Judicial power, as contradistinguished from the power of the laws, has no existence.

> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

VII.

The lower court held that the correspondence desired to be examined should be specified and its contents exactly stated in the petition. It is manifestly impossible to know what is contained in the correspondence until it is examined, and the purpose of the examination is to ascertain if the correspondence contains any matters germane to the investigation by the Commission.

The lower court stated in its opinion, as a further reason for denying the writ, that the correspondence and contents thereof were not definitely described in the petition. It is respectfully submitted that it would have been impossible to set out in the petition with particularity and certitude the contents of the correspondence without knowledge of such contents. This knowledge could only be acquired by an examination of the correspondence; and if the Commission had that knowledge the examination of the papers and letters would not be

necessary. The prayer of the petition specifies clearly and definitely the exact relief desired; that is, in the language of the statute, access to the accounts, records, and memoranda of the defendant. This is a sufficient discription in a petition for mandamus to enforce the visitatorial power of the Commission under the act to regulate commerce.

In case of *Consolidated Rendering Company* v. *Vermont*, 207 U. S. at page 553, the Supreme Court said:

> We see no reason why all such books, papers, and correspondence which related to the subject of inquiry and were described with reasonable detail, should not be called for and the company directed to produce them. *Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.* The notice is not nearly so sweeping in its reach as in the case of *Hale* v. *Henkel, supra.*

The position of the defendant railroad appears to be because some of the letters and correspondence *are alleged by it* to be personal and privileged, therefore *all* of its letters and correspondence by this mere *allegation* become exempt from visitation. A contention somewhat similar was passed upon in the case of *Consolidated Rendering Company* v. *Vermont, supra.* In that case the court said, page 553:

> Obviously the company could not by its refusal to produce the books thereby entirely conclude the court from any examination whatever into the sufficiency of the excuses for such nonproduction. Otherwise, the company could disobey at its pleasure, and so prevent any inquiry into the merits of the excuses. *The statute might as well not exist if this were to be permitted.*

The power of visitation over a public-service railroad sought to be exercised by the Interstate Commerce Commission in this case is far more comprehensive than the authority invoked, in the case just cited, to compel the production of certain books and papers of a private *business corporation* before a grand jury.

VIII.

CONCLUSION.

In the light of these principles, that a corporation is a creature of the State; that it is a legal entity, invisible, intangible, and existing only in contemplation of law; that it possesses only such life and such powers as are given by law; that it is at all times subordinated to the requirements of law and answerable to its demands, how can it be successfully maintained that a public-service corporation, like the defendant, may secrete a part of its records from the Government and vitiate the regulating statutes by calling its records and documents *private* letter files, and asserting on that account immunity from visitation? The statutes and de-

cisions of the courts demolish such a contention, so utterly opposed to right and to reason.

The counsel for the Louisville & Nashville Railroad Company declared in their brief in the court below, "Certainly the time has not yet come when there is nothing private or confidential in the management of a carrier engaged in interstate commerce." The answer is that the time has come—indeed, has never been otherwise since the Government has had the power of visitation. The operation of a railroad is not the private concern of those who run it, but it is charged with the public use and subject to public regulation and governmental visitation. There can be nothing private or confidential in the management of a carrier engaged in interstate commerce as against the visitatorial power of the Government.

Respectfully submitted.

Jos W. Folk

Counsel for Interstate Commerce Commission.

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APPENDIX.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 10th day of November, A. D. 1913.

No. 6319.

IN RE FINANCIAL RELATIONS, RATES AND PRACTICES OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY AND OTHER CARRIERS.

The United States Senate having, by resolution No. 153, adopted November 6, 1913, directed the Interstate Commerce Commission to investigate, take proof, and report to the Senate as soon as practicable—

First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if

any, of stock, bonds, and other securities of the Nashville and Decatur Railroad and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad or any of its subsidiaries or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing or tending to show whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing or tending to show (*a*) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (*b*) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga and Saint Louis Railway, by which the former uses the tracks of the said Western and Atlantic Railway, restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing or tending to show whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats, and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

Tenth. Any fact or facts showing or tending to show whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company or Atlantic Coast Holding Company owns in the Louis-

ille and Nashville Railroad and in the Atlantic Coast Line, and hether the ownership by such holding company of a majority of ock in both of the aforesaid railroads tends to restrict competition nd maintain and fix rates;

Twelfth. What amount, if any, the Louisville and Nashville Rail- oad, the Nashville, Chattanooga and Saint Louis Railway, the Nash- lle and Decatur Railroad, and the Lewisburg and Northern Rail- oad, all or any of them, have subscribed, expended, or contributed or the purpose of preventing other railroads from entering any of e territory served by any of these railroads for maintaining politi- l or legislative agents, for contributing to political campaigns, for eating sentiment in favor of any of the plans of any of said rail- oads; and

Thirteenth. (*a*) The number of free annual passes; (*b*) the number free-trip passes; (*c*) the number of every kind of free passes issued each of said railroads each year since January first, nineteen hun- ed and eleven, to members of legislative bodies and other public ficials or at the request of members of legislative bodies and other blic officials; (*d*) the total mileage traveled upon free passes issued der each of the above classifications; and (*e*) the amount in money e free passes issued under each of the above-mentioned classifica- ns would equal at the regular rates for such service of each of the ove-named railroads;

It is ordered, That a proceeding of inquiry and investigation be, d the same is hereby, instituted into and concerning the several atters and things set forth and referred to in the said resolution.

It is further ordered, That this proceeding be set for hearing at ch times and places, and that such persons be required to appear d testify or to produce books, documents, and papers as the Com- ssion may hereafter direct; and that the investigation be carried in the meantime by such other means and methods as may be emed appropriate.

And be it further ordered, That a copy of this order be served on each of the following-named railroad companies and upon y other companies which may hereafter be designated by the mmission: Nashville, Chattanooga & St. Louis Railway; Louis- le & Nashville Railroad Company; Nashville & Decatur Railroad mpany; Lewisburg & Northern Railroad; Tennessee Midland ilroad Company; Tennessee, Paducah & Alabama Railroad; West- & Atlantic Railroad; and Atlantic Coast Line Railroad Com- ny.

By the Commission:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

69

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, BY James C. McReynolds, Attorney General of the United States, plaintiff in error and appellant,

v.

LOUISVILLE & NASHVILLE RAILROAD Company.

No. 499.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, on behalf of the United States, and moves the court to advance this cause for hearing on a day convenient to the court during the present term.

The case involves the power of the Interstate Commerce Commission, under section 20 of the Act to Regulate Commerce, to examine the accounts, records, and memoranda of an interstate carrier.

A resolution of the Senate, adopted November 6, 1913, directed the Interstate Commerce Commis-

sion to investigate and report with reference to the ownership of the Louisville & Nashville Railroad, and its association and connection with certain other railroads. Thereupon, through one of its special agents and examiners, the Commission made a demand upon the officer of the railroad company in charge of the memoranda, accounts, and records for access to and opportunity to examine such of them as were of date on and subsequent to August 28, 1906, which demand was refused. The railroad company for a time had permitted an examiner of the Commission to inspect some of its records, but not all that the Commission claimed the right to inspect under the power given to it by the various acts to regulate commerce. Thereupon a petition for mandamus was filed in the district court by the Attorney General praying that the Louisville & Nashville Railroad Company might be commanded to comply with the provisions of the Act to Regulate Commerce, as amended, and give access to its accounts, records, and memoranda, to its correspondence and copies of correspondence, and to afford opportunity to the Interstate Commerce Commission, its agents and examiners, to examine the same.

The District Court dismissed the petition upon the grounds, among others—

> 1. That except in the clause of the Senate resolution, which refers to an inquiry as to free passes issued, the resolution does not re-

late to interstate commerce as regulated by the act; and

2. That when all contained in the resolution is eliminated, the allegations of the petition are too vague and general to justify the issuance of the writ.

As a result of this decision, the extent of the authority of the Commission in the matter of investigations which it undertakes is rendered uncertain. The case is one of general public importance, and as it is evident that the questions involved will affect the operations of the Interstate Commerce Commission, they should be decided as promptly as possible.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1914.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, By James C. McReynolds, Attorney General of the United States, - - - Plaintiff in Error,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Defendant in Error.

No. 499.

Brief for Louisville & Nashville Railroad Company.

HENRY L. STONE,
WILLIAM A. COLSTON.
EDWARD S. JOUETT,
HELM BRUCE,
Attorneys for Defendant in Error.

November 30 1914.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, ATTORNEY GENERAL OF THE UNITED STATES, - - - - - *Plaintiff in Error,*

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - *Defendant in Error.*

No. 499.

Brief for Louisville & Nashville Railroad Company.

STATEMENT.

Prior to the institution of this action, and prior to the demand and refusal which are made the basis of the prayer for a mandamus herein, the Interstate Commerce Commission had caused to be served upon the Louisville & Nashville Railroad Company, defendant in error, an order of the Commission, the terms of which are important, and which we, therefore, here quote in its entirety:

"ORDER.

At a General Session of the Interstate Commerce Commission, held in its office in Washington, D. C., on the 10th day of November, A. D. 1913.

Edgar E. Clark,
Judson C. Clements,
James S. Harlan,
Charles A. Prouty,
Charles C. McChord,
Balthasar H. Meyer,
John H. Marble,
Commissioners.

No. 6319.

In re financial relations, rates and practices of the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; and other carriers.

The United States Senate having, by Resolution No. 153, adopted November 6, 1913, directed the Interstate Commerce Commission to investigate, take proof, and report to the Senate as soon as practicable—

First. What amount of stock, bonds and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

Second. What other railroads in the territory served by the Louisville & Nashville Railroad and the Nashville, Chattanooga & Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with for the purpose of controlling by either the Louisville & Nashville Railroad or the Nashville, Chattanooga & Saint Louis Railway;

Third. Whether the Louisville & Nashville Railroad and the Nashville, Chattanooga & Saint Louis Railway serve the same territory, in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing, or tending to show, the further relations between the Louisville & Nashville Railroad and the Nashville, Chattanooga & Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville & Decatur Railroad by the Louisville & Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville & Decatur Railroad and of the Lewisburg & Northern Railroad are owned by the Louisville & Nashville Railroad or any of its subsidiaries or holding companies;

Sixth. Whether the Nashville & Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville & Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing or tending to show the further relations between the Louisville & Nashville Railroad, the Nashville & Decatur Railroad, and the Lewisburg & Northern Railroad, and any fact or facts showing or tending to show whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing or tending to show (a) the relations between the Louisville & Nashville Railroad, the Nashville, Chattanooga & Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah & Alabama Railroad, and any other railroads that have been purchased

or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates, and (b) whether the lease of the Western & Atlantic Railroad by the Nashville, Chattanooga & Saint Louis Railway from the State of Georgia and the arrangement made between the Louisville & Nashville and the Nashville, Chattanooga and Saint Louis Railway by which the former uses the tracks of the said Western and Atlantic, restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing or tending to show whether the ownership of the Louisville & Nashville Railroad and the Nashville, Chattanooga & Saint Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee rivers, and any dock or dockyards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly, and restricts competition, and determines and fixes rates;

Tenth. Any fact or facts showing or tending to show whether an agreement or arrangement has been entered into between the Louisville & Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville & Nashville Railroad, in consideration of the Louisville & Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company, or Atlantic Coast Holding Company, owns in the Louisville & Nashville Railroad and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tend to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville & Nashville Railroad, the Nashville, Chattanooga & Saint Louis Railway, the Nashville & Decatur Railroad, and the Lewisburg & Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free, annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads;

It is ordered, that a proceeding of inquiry and investigation be, and the same is hereby, instituted into and concerning the several matters and things set forth and referred to in the said resolution.

It is further ordered, that this proceeding be set for hearing at such times and places, and that such persons be required to appear and testify or to produce books, documents, and papers as the Commission may hereafter direct; and that the investigation be carried on in the meantime by such other means and methods as may be deemed appropriate.

And it is further ordered, that a copy of this order be served upon each of the following-named railroad companies and upon any other companies

which may hereafter be designated by the Commission:

Nashville, Chattanooga & St. Louis Railway;
Louisville & Nashville Railroad Company;
Nashville & Decatur Railroad Company;
Lewisburg & Northern Railroad;
Tennessee Midland Railroad Company;
Tennessee, Paducah & Alabama Railroad;
Western & Atlantic Railroad; and
Atlantic Line Railroad Company.

By the Commission:
(Signed) GEORGE B. MCGINTY,
Secretary."

(Record, page 33; also page 10.)

It will be observed from the language of the order that it first recites the adoption of the foregoing resolution of the United States Senate, consisting of thirteen paragraphs, which the order quotes in full, and after this quotation the order proceeds as follows:

> "It is ordered, that a proceeding of inquiry and investigation be, and the same is hereby, instituted *into and concerning the several matters and things set forth and referred to in the said resolution.*"

After the making of this order and its service upon the defendant in error, the "proceeding of inquiry and investigation" was begun; and in the course of it the examiners of the Commission demanded unlimited access to the offices of defendant, with a right to examine everything in them. This demand being refused, the present action was instituted in the United States District Court for the Western District of Kentucky.

An answer was filed making certain defenses, which will be more specifically referred to hereafter.

Proof was heard orally before the court, which is shown by the bill of exceptions in the record, and the court, after consideration, delivered a written opinion and pursuant thereto overruled the motion for a mandamus and dismissed the petition without prejudice. (For opinion see record 16; United States v. Louisville & Nashville R. R. Co., 212 Fed. 486; and for order and judgment see record 15.)

The district court in its opinion found it unnecessary to consider the question of whether or not the demand made by the Commission would, if enforced, constitute an unreasonable search or seizure of the private papers of defendant, as pleaded in the answer; and found that as to the inquiry called for by the thirteenth paragraph of the Senate resolution, to-wit, as to *free passes*, "full and satisfactory information has been given to the examiners by the defendant." Having disposed of these two matters the court then held that, as granting a writ of mandamus is a matter of sound discretion, there was so much doubt as to the right of the court to compel defendant to exhibit its papers, and such vagueness, indefiniteness and generality in the allegations of the petition, as to what papers plaintiff demanded to examine, the court could not grant the writ. Accordingly the motion for mandamus was overruled and the petition dismissed without prejudice.

It is proper here to say that a similar petition for mandamus was filed (practically contemporaneously with

the one now under consideration) against the Nashville, Chattanooga & St. Louis Railway in the United States District Court at Nashville, Tenn. And upon the hearing of the motion for mandamus in that case, before Judge Sanford, the motion therein was also overruled and the petition dismissed absolutely, Judge Sanford delivering an opinion in which he construed the Act to Regulate Commerce, his construction being that contended for by the railroad company. This opinion is to be published in the Federal Reporter, but at the date of writing this brief has not yet appeared. We, however, quote the same in the appendix to this brief from a manuscript copy furnished to us.

It will probably be easier to understand and appreciate the ground upon which the petition in the case at bar was dismissed by the District Court in Kentucky, when the questions sought to be raised in the case have been, to some extent, considered; and as the Solicitor General has briefed the case elaborately on its merits, we will consider it in that way first and conclude with a reference to the ground upon which the court in the case at bar overruled the motion for mandamus and dismissed the petition.

ARGUMENT.

Of course it is a self-evident proposition that if the examiners for the Interstate Commerce Commission demanded the right to inquire into matters which they were not authorized to inquire into, the railroad company was justified in refusing to submit to the inquiry; and the court was correct in dismissing the petition for mandamus.

And the railroad company does take the position just indicated, to-wit, that the Commission's examiners were seeking to make an inquiry and to examine papers, in course of their inquiry, for which they had no authority.

I.

The Inquiry Directed by the Commission was Limited by its Terms; and the Examiners Had no Right to go Beyond Those Limits.

In the first place, it will be observed from the language of the Commission's order heretofore quoted, that it was not a general unlimited order for an inquiry into the affairs of the Louisville & Nashville Railroad Company, and of the other companies therein named; but it was a limited order, an order expressly limited by its own terms, to certain specific inquiries, each being set forth in a numbered paragraph. It matters not that these inquiries were originally drafted by the Senate, or some member thereof. It is just the same as if the Commission itself, without the instigation of the Senate, had

made an order that those specific things be inquired into. It will be observed, as heretofore mentioned, that after setting forth the special subjects of inquiry embraced in the Senate resolution, the order of the Commission then proceeds:

> "It is ordered, that a proceeding of inquiry and investigation be, and the same is hereby, instituted *into and concerning the several matters and things set forth and referred to in the said resolution.*"

The remaining part of the order is simply as to *procedure*, saying that the proceeding shall be set for hearing at such times and places, and that such persons shall be required to testify, and such books, documents and papers be produced as the Commission may direct; and that the investigation be carried on in the meantime by such other means and methods as may be appropriate. *The subjects of inquiry, however,* are simply those set forth in the Senate resolution, and none other. And we understand the brief of the Solicitor General to admit—although this was not conceded in the court below—that the inquiry and investigation which the Commission was making at the time of the facts involved in this case, were simply those expressed in the Senate resolution, which was copied into the Commission's order. Thus the Solicitor General, at the very beginning of his brief, says:

> "The relief sought by the writ was to compel the defendant in error, Louisville & Nashville Railroad Company, a carrier engaged in interstate commerce, to comply with the provisions of the Act to Regulate Commerce by permitting the Interstate Commerce

Commission, in the exercise of the authority conferred upon it, to have access by its authorized and duly appointed special agents and examiners to all of the accounts, records, and memoranda of the defendant company.

"The Commission was engaged at the time in a 'proceeding of inquiry and investigation' *into certain matters and things set forth in Senate Resolution No. 153*, adopted November 6, 1913, which is as follows." (Quoting the resolution in full.) (Brief, pages 1 and 2.)

Again in the same brief, after quoting in full the resolution, it is said:

"The proceeding of inquiry and investigation was instituted by the Commission on November 10, 1913, and special agents and examiners duly appointed by the Commission were authorized to inspect and examine the accounts, records and memoranda of the defendant in error." (Brief, page 6.)

And the date here given as the date when this proceeding was instituted is the date of the order heretofore quoted.

And again the Solicitor General says:

"The Commission therefore had the power to institute this investigation on its *own* motion and was necessarily the judge as to what information and what representations should be deemed sufficient to cause it to investigate. It had a clear right to give heed to the resolution of the Senate and to comply with it so far as its powers permitted. Having been stirred to action, it was not even bound to restrict its inquiry to the limits fixed by the resolution, *although it appears that it elected to do so.*" (Brief, page 12.)

The importance of the point to which we are here directing the court's attention, arises from the fact that the railroad company, defendant in error, has always insisted since this inquiry began, and now insists, that the matters into which the Commission sought to inquire by the order quoted, were, and are, matters not within the jurisdiction of the Interstate Commerce Commission; that they are matters which would be relevant to an inquiry as to whether or not the act, which is popularly known as the "Sherman Anti-Trust Act," had been violated, but not matters within the scope of the Act to Regulate Commerce; and, therefore, that the Interstate Commerce Commission had, and has, no authority to examine into them, and therefore, of course, no authority to demand the inspection of any papers in order to answer the inquiries which the Commission had no right to make.

II.

The Commission Had no Authority to Make the Examination it Sought to Make.

That the Interstate Commerce Commission, created by the Act to Regulate Commerce, has only jurisdiction to deal with matters controlled by that act (except where specially authorized, as it is by a few acts), seems to be very clear; and has frequently been recognized by the Commission itself.

In one of the earliest cases decided by the Commission, Traders & Travelers Union v. Philadelphia, etc., R. Co., 1 I. C. Rep. 371, the Commission said:

"Nor have we any general power or authority to manage the business of carriers, but only a limited power, expressly defined by the statute, to interfere to prevent wrong and oppression in specified cases. Every ground of our jurisdiction, as defined by the statute, relates directly or indirectly to the transportation of persons and freight by carriers at fair and reasonable rates, and with absolute impartiality as to facilities and accommodations." (Page 374.)

Again in New York Produce Exchange v. Baltimore & Ohio R. Co., 7 I. C. Rep. 612, the Commission, through Commissioner Prouty, used this clear and emphatic language:

"*Our only jurisdiction is to inquire whether the Act to Regulate Commerce has been violated.* That law does not seek to interfere with the business operations of carriers subject to its provisions until those operations contravene the provisions of the act itself. * * * Our only inquiry is, does the situation which the carriers have created violate the Act to Regulate Commerce. That this is the extent of our authority is now settled by the decisions of the United States Supreme Court." (Citing authorities. (Page 658.)

Again in Spring v. Baltimore & Ohio R. Co., 8 I. C. Rep. 443, the Commission said:

"The real difficulty is that the Commission has *no authority to administer the Anti-Trust law,* or even to determine whether that law has been violated. A court of general jurisdiction could do so, but not an administrative body whose power is limited by the law which created it. We are not prepared to admit that the evidence in this case shows a violation of the statute against trusts, but even if

the fact of such violation were clearly established we do not see how that of itself furnishes ground for an order by us against the rates now in force." (Page 456.)

Again in the case of Haines v. Chicago, Rock Island, etc., R. Co., 13 I. C. Rep. 214, the Commission in an opinion by Mr. Commissioner Lane, said:

> "The Interstate Commerce Commission is a creature of statute, and its authority is derived from the Act of Congress creating the Commission and the various amendments thereto. *Its function is to administer the Act to Regulate Commerce; not to enforce conditions found in Federal or other charters.*" (Page 216.)

And this court, and the subordinate Federal courts, have been equally as distinct and emphatic as the Commission itself in limiting its jurisdiction to the enforcement of the Act to Regulate Commerce.

Thus in Texas & Pac. Railway v. Interstate Commerce Commission, 162 U. S. 197, this court said:

> "It is also obvious that if the Commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant legislative powers to the Commission." (Page 216.)

Again in the same case, it having been insisted by the Commission that it was its duty "to so construe the Act to Regulate Commerce as to make it practically *co-operate* with what it has assumed to be the *policy of the tariff*

laws," this court expressly repudiated that view, saying:

> "Our reading of the act does not disclose any purpose or intention, on the part of Congress, to *thereby reinforce the provisions of the tariff laws.* These laws differ wholly in their objects from the law to regulate commerce." (Page 221.)

Another case which very sharply draws the line between the Act to Regulate Commerce and the Anti-Trust Act, and as to the duties and powers of the Interstate Commerce Commission with reference to facts within the scope of those two acts, is the late case of United States v. Pacific Arctic Co., 228 U. S. 87. This case was a writ of error to the District Court for Alaska, involving an indictment which contained six counts. The sixth count became immaterial, due to facts not necessary now to be stated. Concerning the other five counts, this court, in its statement of facts by Mr. Justice McKenna, said: "The *first and second count* charge violations of the *Anti-Trust Law.* (Page 88.) * * * The *third* count charged an unlawful and unjust discrimination in the transportation of passengers and freight, *in violation of the Interstate Commerce Act.* (Page 92.) * * * *Count 4 is the same,* as to the facts alleged, as to the *third* count (except as to period of time). * * * *Count 5* brings the discrimination charged down to the finding and presentation of the indictment. (Page 94.)"

In other words, from this statement of fact, it is seen that the first and second counts charged alleged violations of the Anti-Trust Act; while the third, fourth and

fifth counts charged violations of the Interstate Commerce Act. The district court had sustained a demurrer to each of these five counts, on the ground that it was not shown that the Interstate Commerce Commission had acted upon the facts charged in these counts to be violations of law.

This court reversed the judgment, *in so far as it sustained the demurrers to the first and second counts,* charging violations of the Anti-Trust Act; but left the judgment standing—in effect practically *affirming* the same—*in so far as it sustained demurrers to the third, fourth and fifth counts* charging violations of the Act to Regulate Commerce. Thus the court drew sharply and clearly the line between the duties and powers of the Commission concerning alleged violations on the one hand of the Act to Regulate Commerce, and, on the other hand, of the Anti-trust Act, holding that, in the former case, the Commission must act before an indictment could be found based on alleged violations of the Act to Regulate Commerce; but holding, in the latter case, as to alleged violations of the Anti-Trust Act, that no such action of the Commission was necessary, and, as we understand the meaning and effect of the decision, that the Commission had nothing to do with a violation of the Anti-Trust Act.

So in Harriman v. Interstate Commerce Commission, 211 U. S. 407 (a case to which we will hereafter refer again for another point), the court in speaking of the Act to Regulate Commerce, said:

> "Whatever may be the power of Congress, it did not attempt, in the Act of February 4, 1887, C. 104, 24 Stat. 379, to do more than to regulate the interstate business of common carriers, and the primary purpose for which the Commission was established was to *enforce the regulations which Congress had imposed.*" (Meaning manifestly, had imposed by the act referred to, and not by other acts, such as the Anti-Trust Act, etc.) (Page 418.)

Furthermore, if we should consider this question as an original one, it would seem perfectly clear that the Interstate Commerce Commission, created by the Act to Regulate Commerce, was never intended to be used as an instrument for enforcing other acts, such as the Anti-Trust Act (except in case of a few acts, mentioned in the Solicitor General's brief, page 14, which it has been given specific authority to administer). Take, for example, the two acts just mentioned, the Anti-Trust Act and the Interstate Commerce Act. Their purposes are widely different, just as the court in Texas & Pac. R'y v. Interstate Commerce Commission, heretofore quoted, said that the Interstate Commerce Act and the tariff laws "differ wholly in their objects." A given statement of facts can constitute a violation of the Anti-Trust Act without violating the Interstate Commerce Act, and *vice versa.* For example, railroads might *by agreement* fix rates for interstate traffic and agree to abide by them for a given length of time. If rates so fixed were in and of themselves *fair and reasonable,* there would be no violation of the Interstate Commerce Act; but such action would clearly be a violation of the Anti-Trust Act. (United States v. Joint Traffic Assn., 171 U. S. 505.) In the case

just cited certain rates had been *agreed upon*, which were "*admitted to be reasonable.*" (171 U. S. 565.) Yet the agreement was held to be a violation of the Anti-Trust law.

It would seem, therefore, to be very clear that the Interstate Commerce Commission has nothing to do with the enforcement of the Sherman Anti-Trust Act, and has no power or jurisdiction to inquire whether or not that act has been violated, and that the jurisdiction and powers of the Interstate Commerce Commission are confined to inquiries and trials concerning matters regulated by the Interstate Commerce Act.

If the foregoing conclusion be correct, the question then arises as to whether or not "the several matters and things set forth and referred to in the said resolution," which is copied into the Commission's order, and concerning which it thereby instituted a "proceeding of inquiry and investigation," are matters regulated by the Interstate Commerce Commission, or, on the other hand, are matters regulated simply by the Anti-Trust Act. And this question would not seem to be very difficult to answer.

Probably no better, or more often quoted, statement of the purpose of the Act to Regulate Commerce has ever been made than that made by Judge Jackson, afterwards Mr. Justice Jackson, in Interstate Commerce Commission v. Baltimore & Ohio R. Co., 43 Fed. Rep. 37, quoted and approved by this court in Cincinnati, N. O. & T. P. Co. v. Interstate Commerce Commission, 162 U. S. 184, wherein the court said:

"We prefer to adopt the view expressed by the late Justice Jackson, when circuit judge, in the case of the Interstate Commerce Commission v. Baltimore & Ohio Railroad Co., 43 Fed. Rep. 37, and whose judgment was affirmed by this court, 145 U. S. 263:

" 'Subject to the two leading prohibitions that *their charges shall not be unjust or unreasonable,* and that they shall not *unjustly discriminate,* so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.' " (Page 197.)

On the other hand, the purpose of the Anti-Trust Act has been stated several times by this court in certain leading cases, in some of which the difference in purpose and effect of the Anti-Trust Act and the Interstate Commerce Act have been pointed out.

Thus in Northern Securities Co. v. United States, 193 U. S. 197, the court said the following propositions were deducible from its former decision, to-wit:

"That although the Act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, or whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint of*

trade or commerce among the several States or with foreign nations. * * * That Congress has the power to establish rules by which the interstate and international commerce shall be governed, and, by the Anti-Trust Act, has prescribed *the rule of free competition* among those engaged in such commerce;

"That every combination or conspiracy which would *extinguish competition* between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act; * * *

"That to vitiate a combination, such as the Act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a *total suppression* of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it *tends to restrain* interstate or international trade or commerce *or tends to create a monopoly* in such trade or commerce and to deprive the public of the advantages that flow from free competition." (Our italics—page 331.)

In United States v. Freight Association, 166 U. S. 290, which involved an attack upon an *agreement to maintain rates,* this court said:

"The general nature of a contract like the one before us is not mentioned in or provided for by the act" (meaning the Interstate Commerce Act). "The provisions of that act look to the prevention of discrimination, to the furnishing of equal facilities for the interchange of traffic, to the rate of compensation for what is termed the long and short haul, to the attainment of a continuous passage from the point of shipment to the point of destination, at a known and published schedule, and, in the language of counsel for defendants, 'without reference to the location of those points or the lines over which it is

> necessary for the traffic to pass,' to procuring uniformity of rates charged by each company to its patrons, and to other objects of a similar nature. The act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as to a maximum or minimum of rates." (Page 315.)

In other words, the court showed that the agreement to maintain rates, which the court then had under consideration, was not forbidden by the Interstate Commerce Act, although the court proceeded to hold that it was forbidden by the Anti-Trust Act, and was, therefore, void.

Then again, the distinction between the two acts is very clearly brought out in United States v. Joint Traffic Association, 171 U. S. 505, heretofore referred to, where again there was involved the validity of an agreement to maintain rates, and where it was sought to distinguish the case then before the court from the Freight Association case just mentioned, on the ground that careful provision was made in the contract before the court in the Joint Traffic Association case to see that the rates were *reasonable.* But on this subject the court said:

> "It is also said that the agreement in the first case conferred upon the association an unlimited power to fix rates in the first instance, and that the authority was not confined to reasonable rates, while in the case now before us the agreement starts out with rates fixed by each company for itself and filed with the Interstate Commerce Commission, and which rates are alleged to be reasonable. *The distinction is unimportant.* It was considered in the other case that the rates actually fixed upon were

> reasonable, while the rates fixed upon in this case are also admitted to be reasonable. By this agreement the board of managers is in substance and as a result thereof placed in control of the business and rates of transportation, and its duty is to see to it that *each company charges the rates agreed upon* and receives its equitable proportion of the traffic." (Page 565.)

And the court held that the agreement to maintain these rates, although they were admitted to be reasonable rates, and would therefore, of course, not contravene the Act to Regulate Commerce, was void, because forbidden by the Anti-Trust Act.

From this consideration of the purpose and effect of these two acts, to-wit, the Act to Regulate Commerce and the Anti-Trust Act, it is perfectly evident that the inquiry ordered by the Interstate Commerce Commission, and which is now the subject of consideration, was to ascertain whether or not facts existed which would constitute *a violation of the Anti-Trust Act,* and not as to facts which would constitute a violation of the Act to Regulate Commerce. This is apparent from almost every paragraph of the order, and is certainly apparent when the various paragraphs are read together, except paragraph 13, on the subject of passes, and which is not now material because the Commission's examiners received all the information called for by that paragraph, which they desired.

It is perfectly evident that the whole object of the inquiry was to ascertain facts bearing on the subject of *restraint of competition, creation of monopoly* and the

maintenance of fixed rates. In other words, the inquiry was, not into facts bearing on the question of whether the railroad companies were, or were not, charging reasonable rates, or whether they were, or were not, discriminating in rates, but as to whether or not they were, either by direct purchase, or by lease, or by control through the ownership of stock, restricting competition and maintaining fixed rates (whether reasonable or unreasonable).

Thus take the four first paragraphs of the order of inquiry. They inquire (1) what securities of the Nashville, Chattanooga & St. Louis are owned by the Louisville & Nashville; (2) what other railroads either of these two have purchased or entered into arrangements with for the purpose of control; (3) whether the Louisville & Nashville and the Nashville, Chattanooga & St. Louis R'y serve the same territory, and whether, under separate ownerships, they would be competitive, and (4) any other facts as to their relations *"tending to show whether these relations restrict competition and maintain fixed rates."* And the remaining paragraphs of the order (except the 13th) are of the same character, though embracing other railroads.

It seems to us to require no further argument than is made by the mere statement of the facts, supported by reference to the language of the order, to show that the Commission was not seeking information bearing upon the question of the reasonableness of any rates, or discrimination between any shippers, places, or commodities, but was simply seeking information as to facts bear-

ing upon the suggestion of suppression of competition, or agreements or combinations for the maintenance of fixed rates; and, therefore, that the Commission had no authority by law to make the inquiries or the examination which it was seeking to make and which it demanded the right to make, and which was refused.

The Solicitor General argues in his brief that the Commission often inquires into questions of competition between railroad companies. Of course this is true in a sense. But, these inquiries are made, or these facts as to competition are considered, merely as they bear upon the question of reasonableness of rates, or alleged unjust discrimination between places, or persons or traffic as, for example, where it is insisted that a comparison between two different rates shows an unjust discrimination, and where in defense of the rates it is shown that in the one case there is competition, while in the other case there is not. But to hear evidence as to competition and to consider competition as bearing upon the reasonableness of rates, or upon a charge of discrimination, is a totally different thing from an investigation upon the subject of suppressing competition or creating monopoly. The one is a legitimate inquiry upon subjects within the jurisdiction of the Interstate Commerce Commission, directly bearing upon the enforcement of the Interstate Commerce Act, or its violation, and the other is an illegitimate inquiry bearing upon possible violations of the Anti-Trust Act.

There is one section, Section 5 of the Interstate Commerce Act, which the Solicitor General briefly mentions,

which does bear upon the matter of competition between railroads by prohibiting one particular thing, to-wit, *the pooling of freights* or *division of earnings* of competing roads. But as this is so distinct a subject, it is impossible to believe that, if either the Senate in passing its resolution, or the Commission in making its order, had intended to make an inquiry on that subject, which it would have been so easy to describe, it would have said so. But we see that in all the long and detailed provisions of the resolution and order there is no reference to this subject of pooling of freights or division of earnings, and manifestly it was not in the mind either of the Senate or the Commission.

III.

The Commission's Inquisitorial Powers are not Without Limit.

The Solicitor General, however, insists, if we understand his argument, that the Interstate Commerce Commission's power of inquiry into the affairs of a railroad corporation and of examination of its books and papers, is without limit, either as to purpose or subject-matter; that it is not required to say what it desires to examine or why it desires to examine it. If this be true, then, if the Commission should desire to make an investigation or examination for the purpose of determining whether or not the tariff laws had been violated and thus to carry out its view of the law which it urged in Texas & Pacific Railway v. Interstate Commerce Commission, 162 U. S.

221, to-wit: "that it is the duty of the Commission to so construe the Act to Regulate Commerce as to make it practically co-operate with what is assumed to be the policy of the tariff laws" it could do so, although this court held in that case that the Commission's view of its powers was erroneous and that the court's reading of the Interstate Commerce Act did not disclose any purpose on the part of Congress "to thereby re-enforce the provisions of the tariff laws" (page 221). Or, if the Commission should choose to make an examination for the purpose of aiding the Post Office Department in an inquiry as to whether or not any of the Postal laws had been violated, it could do so, although the Act to Regulate Commerce, and the Commission created under that act, have nothing whatever to do with the enforcement of the Postal laws.

Without considering for the present the question of the *power* of Congress to make the Interstate Commerce Commission either a general government inspector or detective, in aid of all of its departments, and to vest in the Commission, therefore, powers of examination sufficient for the accomplishment of such a purpose, we submit that Congress has not attempted to exercise any such power or do any such thing.

Counsel for the government refers to the provisions of Section 12 of the Act to Regulate Commerce, giving the Commission "authority to inquire into the management of the business of all common carriers subject to the provisions of this act." And requiring it "to keep itself informed as to the manner and method in which

the same is conducted"; and also to Section 21 of the act, making it the duty of the Commission to report annually to Congress, giving "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary"; and also to Section 20 of the act, saying the Commission "shall at all times have access to all accounts, records and memoranda kept by carriers subject to this act." So far as Sections 12 and 21 are concerned, they stand today just as they have stood without amendment in any respect since 1891. The right of access to "accounts, records and memoranda" now given by Section 20 was introduced into the Interstate Commerce Act by the Hepburn Amendment of June 29, 1906.

These different sections of the act, and the extent of the powers thereby granted, have heretofore received consideration by this court. Counsel for the government refer several times to the case of Interstate Commerce Commission v. Brimson, 154 U. S. 447, in support of the claim of broad authority in the Commission in respect to inquisitorial powers. But that case is certainly far from laying down the proposition that the Commission's power of examination is without limit as to object or purpose. On the contrary, the opinion of the court shows beyond a question that the Commission's power in this respect is a limited power, and is confined to matters involved in the enforcement of the Commerce Act.

The court, speaking of the provision contained in Section 12 of the act, empowering the Commission to examine into the management of the affairs of the carriers, says the Commission is entitled in that way "to obtain full and accurate information of all matters involved in the enforcement of the Act of Congress," referring to the Act to Regulate Commerce. (Page 473.)

Again, in speaking of the duty of the citizen to obey the law and to appear and testify and produce books, papers, etc., when called upon by the Commission, the court says:

> "This power conferred upon the Commission imposes upon anyone, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon anyone required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, *if such matter is one which the Commission is legally entitled to investigate,* and if the witness is not excused on some personal ground from doing what the Commission requires at his hand" (page 476).

Again, in responding to the argument that the twelfth section is in derogation of the fundamental guarantees of personal rights recognized by the Constitution, the court says this is not true, and referring to the fact that any question raised by the witness would have to be decided by a court before he could be compelled to answer or to produce any book or paper, the court says:

> "Suffice it in the present case to say that as the Interstate Commerce Commission by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; *or that neither the questions propounded nor the books, papers, etc., called for, relate to the particular matter under investigation, nor to any matter which the Commission is entitled, under the Constitution or laws to investigate.*" (Page 479.)

And finally in directing the form of the judgment to be entered on the appeal, the lower court, having refused to require the witness to answer solely on the ground that the act imposing this duty on the court was unconstitutional, the Supreme Court noting the fact that "no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants," said:

> "Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section in the particular named is constitutional, and to remand the cause that the court below may proceed with it *upon the merits* of the questions presented by the petition and the answer of the defendants and make such determination thereof as may be consistent with the law." (Page 490.)

It would not be possible to show more clearly than this Brimson case does show that the power of the Com-

mission as to examination of witnesses or to call for the production of papers, books, documents, etc., is not an unlimited power, but is one that can only be exercised to enable the Commission to perform its duty under the law creating it. And that any witness called upon to answer a question or to produce a book, paper or document can make the objection that "neither the questions propounded nor the books, papers, etc., called for related to the particular matter under investigation, nor to any matter which the Commission is entitled, under the Constitution or laws to investigate." And if that proposition is true, then it inevitably results that the Commission's inquisitorial power is not unlimited and that it can not examine whatever it pleases, and for whatever purpose it pleases.

Neither Section 12 nor Section 21, upon the broad language of which counsel for the government rely, has been changed in any particular since the decision of this court in the Brimson case.

SECTION 20 OF THE ACT TO REGULATE COMMERCE.

Section 20 of the Commerce Act was, however, amended by the Hepburn Act of June, 1906, by which amendment certain power was given the Commission to make personal examination of certain things therein specified. And to that we now call attention. And before quoting the words of the statute, we call attention to this suggestion: The court had long before the passage of this act held, as we have just seen, that the powers and duties of examination imposed upon the Commis-

sion by the act did not give it the unlimited right to examine whatever it pleased and for whatever purpose it pleased, and had held the question as to the relevancy or materiality of the books, papers, etc., "to the particular matter under investigation" and as to whether or not the matter was one "which the Commission is entitled, under the Constitution or laws, to investigate" could be raised in court when the books or papers were called for. And it would surely take strong, plain language in the Amendment of 1906 to satisfy the mind that, because Congress gave the Commission power to make certain personal examination at the carrier's place of business, which examination is necessarily made out of the presence of the court, it was intended by the mere fact that an additional *mode of examination* was provided to take away all limits upon the purposes for which the Commission could make the examination, or the books, papers, etc., which it could examine.

By the Hepburn Amendment of June, 1906, the following provision was inserted in Section 20 of the Act, to-wit:

> "The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by

the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act.

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, multilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

"Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both."

It is now insisted that by virtue of the language of this amendment, the Commission, by its examiners, can step into any office of the carrier at any time and examine whatever he pleases, for whatever purpose he pleases, and no matter what the date of the transaction concerning which he desires to inquire, or the date at which the record was made or a letter written; that in case of the Louisville & Nashville Railroad Company, for example, the examiner can, if he so desires, go back over a course of sixty years in his examinations.

We submit that the act is susceptible of no such construction. And, to narrow the case to a question which was sharply made in the present case, we submit that this act only gives the Commission's examiner the right to examine "accounts, records and memoranda," *as those terms are used in this act, and with the meaning which the act plainly gives them;* and that they manifestly refer merely to statistical information with reference to "the movement of traffic as well as the receipts and expenditures of moneys," to-wit, such information as is contained not only in financial accounts, but accounts of the mileage made over a road by its engines or cars and

its tonnage, and matters of that kind, which will enable the Commission to determine the amount of business being done on any part of a road or the whole of it, and what it is costing per mile or per ton, etc.; but that the term "accounts, records and memoranda" as used in this amendment, *manifestly does not include mere* CORRESPONDENCE.

No person, natural or artificial, engaged in business, wants all of his plans revealed to an outsider. Not only is there contained in the correspondence communications between a business corporation and its legal counsel, communications which have been privileged for hundreds of years by the English common law, but there are often set forth plans of operation, which would be defeated if made public, or out of the publication of which great injury would result without benfit to anyone. Suppose, for example, a railroad corporation contemplates the building of a new line into new territory, passing possibly through a section of country where there is only one feasible route—and we refer to this specially, because that very situation has several times arisen in the case of the client for which we now speak. If its plans, as indicated by the correspondence between its departments or counsel are required to be made public, a competitor may seek to forestall it by taking prior possession of the only feasible route for the projected line; and property all along the line may advance to prohibitive prices. And thus the whole project may be defeated.

Again, there are frequently communications between employers of labor and concerning the relations between

employer and employes, questions involving labor organizations, and the relations between them and employers, all of which are matters of great delicacy and privacy and which the employer does not care to have published, any more than the labor organizations would care to have their communications among themselves made public.

Yet if the Interstate Commerce Commission is given the power to examine into all of these things and read all this correspondence, there is no limitation in law as to the use it can make of it, or as to the preservation of its secrecy. It is true, the statute in question says "any *examiner* who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject" to a fine or imprisonment. But this provision refers only to *the examiner*. It does not refer to the Commission, and it does not impose any restriction upon the right or power of the Commission to make public whatever it chooses to make public.

We have merely called attention to these matters, because we believe they are pertinent in considering whether or not Congress intended that this unlimited right of search should exist, or whether, on the other hand, the things which the act gives the Commission the right to examine are limited by the terms of the act, and if so, what they are.

Before taking up in detail the language of the amendment in question, the history of it is both interesting and

instructive, as bearing upon its meaning by way of showing the *purpose* of those who framed it. It was framed and presented to Congress in the form of a bill by the Interstate Commerce Commission, as is shown in its 19th annual report (Report of 1905), in which report will be found the amendment exactly as now found in the statute (see Appendix to the Report); and in explaining the amendment, the Commission in this report shows beyond question that what it desired to accomplish was to require the keeping of certain forms of *books of account* and to give the Commission the right of examination thereof and to require certain *statistical returns* from the carrier. In the report mentioned, we find the following language *under the following heading,* to-wit:

"EXAMINATION OF BOOKS OF ACCOUNT.

"An efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe a form in which *books of account* shall be kept by railways, with the right on the part of the Commission to *examine such books* at any and all times *through expert accountants.* This recommendation has been urged upon the attention of the Congress in previous reports, and we earnestly renew it at this time. Probably no one thing would go further than this and the detection and punishment of rebates and kindred wrongdoing.

"We have also called attention to the fact that certain carriers now refuse to make the *statistical returns* required by the Commission. For example, railways are required, among other things, to indicate what permanent improvements have been charged to operating improvements. Without an answer to this question, it is impossible to determine

to what extent gross earnings have been used in improving the property and the actual cost of operation proper. Admitting the right of a railroad company to use its money as it sees fit, it is certainly proper that the government should know what use is made of it, for the purpose of determining whether the rates and charges imposed are legitimate. Certain important railways decline to furnish this information at all and others furnish it in a very imperfect and unsatisfactory manner.

"We have also recently required carriers to furnish statistics *showing the rate per ton-mile* actually received for the movement of certain kinds of carload traffic, but this requirement has not been generally complied with." (Interstate Commerce Report of 1905, page 11.)

We do not see in this report of the Commission, which thus explained the purpose of the identical amendment, which we are now considering, any suggestion whatever of a purpose to give the Commission the right to examine all *the correspondence* of a carrier, or anything except the things which the Commission suggested that the carrier should be required to keep.

Let us now turn to the language of the amendment itself. We have already quoted it. It will be observed that the phrase "accounts, records and memoranda" is used nine times and manifestly means the same thing each time it is used, and, in some of the connections in which it is used, including the first one, it would be a manifest absurdity to suppose that it meant to include correspondence.

Thus the reference to this subject begins as follows:

> "The Commission may, in its discretion, *prescribe the forms* of any and *all* accounts, records and memoranda to be kept by carriers subject to the provisions of this act."

Thus it will be observed that the Commission is not simply given the power to prescribe the forms for *certain* accounts, records and memoranda; but it is given the power to prescribe the forms for *all* accounts, records and memoranda to be kept by carriers subject to the provisions of this act. Manifestly, therefore, Congress had in mind, and the Commission itself, when it recommended this act, had in mind, that character of accounts, records and memoranda *for which forms could be prescribed.* While the Commission is not required to prescribe the form for all such accounts, records and memoranda, yet the fact that it is given the power to prescribe the forms for *all of them* conclusively shows that the accounts, records and memoranda which Congress had in mind, were *such things as could be reduced to forms.* And, of course, it needs no argument, or anything more than the bare suggestion, to show that it would be a manifest absurdity to try to reduce *correspondence* to forms. It is, therefore, inevitably true that where the amendment first uses the expression "accounts, records and memoranda," *it does not include correspondence.*

And this is further made manifest by an explanatory statement in the amendment as to what it includes, to-wit:

> "Including the accounts, records and memoranda of *the movement of traffic* as well as the *receipts and expenditures of money.*"

This explanatory statement shows clearly that what Congress had in mind was statistics of the character referred to in the Commission's report, which we have heretofore quoted; statistics as to the movement of traffic, statistics showing the car mileage, or the train mileage, or the tonnage over different parts of the road, as well as the cost of handling the same, so as to enable the Commission to arrive at "the rate per ton mile," and matters of that kind.

Then immediately follows the language giving the Commission access to these accounts, records and memoranda, the language being:

> "The Commission shall at all times have access to all accounts, records and memoranda kept by carriers subject to this act."

Note how exactly the things to which the Commission is here given access correspond to the things for which the Commission is given power to prescribe the forms. In the first provision it is:

> "All accounts, records and memoranda to be kept by carriers subject to the provisions of this act,"

and in the second it is:

> "All accounts, records and memoranda kept by carriers subject to this act."

Thus the things for which the Commission is given power to prescribe the forms, and the things to which the Commission is given access, *are identical.* And we repeat that to suggest that this includes correspondence is an absurdity.

Then the act continues:

> "And it shall be unlawful for such carriers to keep *any other* accounts, records or memoranda than those prescribed or approved by the Commission."

As we have already seen, the Commission is given the power to prescribe the forms for *all* accounts, records and memoranda; and it is contemplated that it may do so; and if it does, then the language just quoted prohibits the carrier from keeping any others. Therefore, if correspondence is included, the carrier could not have any correspondence because it is manifest that the form of it can not be prescribed.

Again the statute says:

> "In case of failure or refusal on the part of any such carrier, receiver or trustee to keep such accounts, records and memoranda *on the books* and in the manner prescribed by the Commission or to submit *such* accounts, records and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier * * * shall forfeit to the United States the sum of $500.00 for each such offense," etc.

Thus the accounts, records and memoranda are matters that are to be kept *upon books,* as well as in a certain form prescribed, and it is "such" accounts, records and memoranda which the carrier is subject to punishment for failing to submit to the inspection of the Commission.

Again the statute says:

> "Any person who shall willfully make any *false entry* in the accounts of any book of accounts or in

> any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter or * * * falsify the record of any such account, record or memoranda, or who shall willfully neglect or fail to make full, true and correct *entries* in such accounts, records or memoranda, * * * *or shall keep any other* accounts, records or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor," etc.

But whoever heard of the writing of a letter being referred to as an "entry" in a record? It is manifest from the language last quoted that the act is referring to records whether in the form of accounts or memoranda, in which, or upon which, according to the ordinary use of language, "entries" can be made, and not to the writing or receipt of letters.

It, therefore, seems to us clear beyond the possibility of a doubt, not only from the history of this act, and the statement of its purpose by its author, but by the very terms of the act itself, that Congress did not have in mind *correspondence* in using the expression "accounts, records and memoranda"; but that in the various places where is used this identical phrase, it has used it with the same meaning; and that when it said:

> "The Commission shall at all times have access to all accounts, records and memoranda kept by carriers subject to this act,"

it included exactly the same things as when it said:

> "The Commission may, in its discretion, *prescribe the forms* of any and *all accounts, records and memoranda to be kept by carriers subject to the provisions of this act.*"

And it would be an absurdity to suppose this to include correspondence.

It is interesting to note for what accounts, records and memoranda, the Commission has, in fact, prescribed forms. These are shown in the first paragraph of the answer in the case at bar (Record, p. 9), showing that they include various classifications of receipts and expenditures, and "classification of locomotive miles, car miles and train miles," etc.

A reference is made by counsel for the government to a proviso added to the amendment to Section 20 as we have heretofore quoted same, which proviso reads as follows:

> "Provided that the Commission may, in its discretion, issue orders specifying such operating, accounting or financial papers, records, books, blanks, tickets, stubs or documents of carriers, which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers or documents shall be preserved."

This amendment was not made as part of the Hepburn Act in June, 1906, but was added by an amendment of February 25, 1909, three years later. It will be observed, it does not use the familiar phrase "accounts, records and memoranda," which ran all through the amendment heretofore quoted. It is manifest, however, that this amendment of February, 1909, giving the Commission power to prescribe what may be destroyed, does not alter the meaning of the Amendment of 1906, giving the Commission power to prescribe forms for all ac-

counts, records and memoranda and giving the Commission access to these. Furthermore, we can see nothing in the language of the Amendment of 1909, that even remotely suggests the idea of an order being made as to when *correspondence* could be destroyed or what correspondence could be destroyed. The language of it is that the Commission may issue orders "specifying such *operating, accounting* or *financial* papers, records, books, blanks, tickets, stubs or documents," etc., which may be destroyed. It will be observed that the qualifying phrase "operating, accounting or financial," applies to each of the substantives following it. In other words, "operating, accounting or financial" *papers,* "operating, accounting or financial" *records,* "operating, accounting or financial" *books,* etc. And certainly this does not include mere correspondence.

IV.

Correspondence Between Carriers and Their Legal Counsel.

Take an illustration of the effect of granting the Government's contention as to the meaning of this act. Among the correspondence in the files of defendant, to which the Commission's examiners demanded unlimited access, and to which it would be given access, if the prayer of its petition for mandamus should be granted, are numerous letters between defendant and its different *legal counsel.* Can it be possible that Congress, by the use of the vague general words found in this act, giving

ileges for confidential communications. Inasmuch as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials till the early 1500s (*ante*, Sec. 1364), and as testimonial compulsion does not appear to have been generally authorized until the early part of Elizabeth's reign (*ante*, Sec. 2190), it would seem that the privilege could hardly have come much earlier into existence; for there could have been but little material for its application. It thus appears to have commended itself, at the early outset, as a natural exception to the then novel right of testimonial compulsion." (4 Wigmore on Evidence, Sec. 2290, page 3193.)

It is unbelievable that, by an act which merely provides that the Commission shall "have access to all accounts, records and memoranda kept by carriers subject to this act," and which act was introduced into Congress accompanied by a report from the Interstate Commerce Commission that "an efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe the form in which *books of account* shall be kept by railways, with the right on the part of the Commission to examine such *books* at any and all times *through expert accountants*" Congress could possibly have intended to make public correspondence between the railways and their legal counsel, and thus by these terms, or by any terms short of express unequivocal declaration, to abolish as to this class of persons, a privilege so universally understood, so ancient, so important, and so firmly "imbedded in our jurisprudence." Yet this would be the effect of adopting the construction put by the Interstate Commerce Commission upon the

provisions of this 20th section of the Commerce Act as amended by the Hepburn Act of 1906.

But we are not without light from this court as to the meaning of this Commerce Act, and the parts of it bearing upon the inquisitorial powers of the Commission since the amendment of Section 20 by the Hepburn Act of 1906. We refer to Harriman v. Int. Com. Com., 211 U. S. 407. It is true that case did not involve an attempt the part of the Commission to make a personal examination of the books and papers of the carrier, but it did involve the general subject of the Commission's inquisitorial powers; the Commission, in that case as in this case, insisting upon a construction of the statute of the widest possible scope. And this court used the following strong language bearing upon that general subject, to-wit:

> "Many broad questions were discussed in the argument before us, but we shall confine ourselves to comparatively narrow ground. The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the Act of February 4, 1887, but to aid it in recommending additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the Commission of its own motion, and not an investigation upon complaint or of some specific matter that

might be made the object of a complaint. To answer this claim, it will be sufficient to construe the Act creating the Commission, upon which its powers depend.

"Before taking up the words of the statute, the enormous scope of the power asserted for the Commission should be emphasized and dwelt upon. Legislation that the Commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to Commerce with foreign nations or among the several States. And the result of the arguments is that, whatever might influence the mind of the Commission in its recommendations, is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say, only legitimately influence the mind of the Commission in the opinion of the court called in aid, still it will be seen that the power if it exists is unparalleled in its vague extent" (p. 417).

Then examining certain provisions of the statute, and especially Section 12, which gives the Commission "authority to inquire into the management of the business of all common carriers, subject to the provisions of this Act," etc., and making it the duty of common carriers to furnish "full and complete information," the court calls attention to the fact that the Commission is only given power to require the testimony of witnesses "for the purposes of this Act." And on that subject, says:

"The Commission, it will be seeen, is given power to require the testimony of witnesses 'for the pur-

poses of this Act.' The argument for the Commission is that the purposes of the Act embrace all the duties that the Act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the business of carriers is conducted, as required by Section 12; that another is that it shall recommend additional legislation under Section 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require anyone whom it may point out to attend and testify if he would avoid the penalties for contempt.

"We are of opinion, *on the contrary*, that the purposes of the Act for which the Commission may exact evidence, embrace only *complaints for a violation of the Act*, and investigations by the Commission upon matters *that might have been made the object of complaint*. As we have already implied, the main purpose of the Act was to regulate the interstate business of carriers, and the secondary purpose that for which the Commission was established, was to enforce the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law" (p. 419).

Then coming to the very section upon which reliance is now placed, to-wit, Section 20, the court says:

"The only other section which is thought to sustain the argument for the Commission is Section 20, amended by the Act of June 29, 1906. C. 3591, Section 7. 34 Stat. 584, 593. This authorizes the Commission to require annual reports from all the carriers concerned, with details of what is to be shown,

> to which the Commission may add in certain particulars, and further, to require from such carriers 'specific answers to all questions upon which the Commission may need information.' The Commission may require certain other reports, *and is to have access to all accounts, records and memoranda.* The section now deals at length with this matter and how accounts shall be kept and the like. It seems to us that it is directed *solely to 'accounts and returns'* and is imposing a duty on the common carrier only from whom the returns come" (p. 421). Our italics.

Now, it is true, as said before, that in that case, the court was only considering the power to compel the production of books and papers by a witness, and not the Commission's power of personal examination at the office of the company; yet the court did, in the language we have quoted, state what was evidently to the court the plain, natural meaning of the language of the statute as to the keeping of accounts, records and memoranda and the Commission's access to same. And it is our argument to-day that this is the only construction that can be placed upon that statute within reason, if we pay any attention to context, including the frequent repetition of the phrase "accounts, records and memoranda," used manifestly with the same meaning each time it is repeated. And the opinion concludes with a statement of a principle which we shall hereafter mention again, as follows:

> "If we felt more hestitation than we do, we still should feel bound to construe the statute, not merely so as to sustain its constitutionality, but so as to

avoid a succession of constitutional doubts, so far as candor permits" (p. 422).

Our view of this Act is also supported by the application of certain rules of construction, to which we may briefly refer.

V.

Rules of Construction.

The familiar rule of construction ordinarily referred to briefly as "*noscitur a sociis*" throws light upon the construction of the expression "accounts, records and memoranda" as used in the Act under consideration.

In Lewis' Sutherland Statutory Construction, 2d Edition, Volume 2, Section 414, the author says:

> "Not only are words and provisions modified to harmonize with the leading and controlling purpose or intention of an act, but also by comparison of one subordinate part with another; that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words and clauses. The principle is embodied in the maxim *noscitur a sociis*, and is applicable to the construction of all written instruments. When two or more words are grouped together and have ordinarily a similar meaning, but are not equally comprehensive, they will qualify each other when associated; they may import a conventional sense and have great scope when so used without restriction in the context, and they may be capable of widely different applications when specialized by accompanying provisions expressive of a particular intention or limited application."

This court has had occasion to refer to and to use this rule of construction. In Virginia v. Tennessee, 148 U. S. 503, in construing the constitutional provision against a State's entering "into any agreement or compact with another State," without the consent of Congress, the court said:

> "It is a familiar rule in the construction of terms, to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning taken by itself, its obscurity or doubt may be removed by reference to associated words. The meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used. Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."

This rule of construction is so familiar and has been so often applied, that it would hardly be proper to add citations of authority on the subject. We simply submit that when the words "accounts, records and memoranda" to which the Commission is given access in this statute are read with their context, which refers to prescribing forms for them, and making entries in them, etc., there can be no doubt on the proposition that they do not include correspondence.

We may also refer to the fact that this statute is highly penal. As we have seen from the quotation of its

terms, any person who "shall keep any other accounts, records or memoranda than those prescribed" shall be subject to a fine of not less than $1,000.00 nor more than $5,000.00, or imprisonment for a term of not less than one nor more than three years, or both such fine and imprisonment; and any carrier who shall fail to "submit such accounts, records and memoranda" to the inspection of the Commission or any of its examiners, shall be subject to a "fine of $500.00 for each such offense, and for each and every day of the continuance of such offense." And in the light of this highly penal provision, the statute, by a familiar rule of construction, should be strictly construed, and we can not give it a different construction from that which the context seems plainly to give, merely on account of any theory as to the inconvenience to which the Commission might be subjected if it can not see all the correspondence of carriers.

In the case of United States v. Wiltberger, 5 Wheat. 96, the court, by Chief Justice Marshall, said:

> "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which would be unsafe to consider as precedents for any general rule for other cases."

It is argued in the case at bar that if the Commission is not given access to all of the correspondence of the carrier, there may be some details which the Commission would like to understand, which it would not be able to learn from accounts, records and memoranda kept according to prescribed forms. But the court certainly would not be authorized, on account of any such reasoning as this, to so construe this highly penal statute, when the entire context, as well as the history of the Act, shows that it was not intended to include correspondence.

Another rule of construction is that a statute will be so construed, if possible, as to avoid reasonable doubts as to its constitutionality. We insist, for reasons that we will hereafter elaborate, resting mainly upon the decision of this court in Hale v. Henkel, 201 U. S. 76, that if this statute be given the broad construction for which the Government contends, it will be an attempt to authorize an "unreasonable search" of the books and papers of the carrier, and will, therefore, be violative of the Fourth Amendment to the Federal Constitution. And this court has often announced that it will, if possible, avoid a construction of a statute which will raise candid doubts as to its constitutionality. (Harriman v. Interstate Commerce Commission, 211 U. S. 407-422.)

Thus far we have considered the true construction of the Act as to the *character* of papers that can be examined by the Commission. We now come to consider a question of *date*.

VI.

Right of Examination of Papers Made Prior to the Adoption of the Hepburn Act Amending Section 20 of the Commerce Act.

As heretofore said, the Hepburn Act amending Section 20 of the Act to Regulate Commerce, and providing for the first time that the Commission should "have access to all accounts, records and memoranda kept by the carriers subject to this Act" was passed June 29, 1906, and became effective August 28, 1906. And the Commission now insists that its right of access and examination given by this Act is not only unlimited as to the character or class of papers to be examined, but unlimited in point of time; and that it has the right, in case of the Louisville & Nashville Railroad Company, for example, to go back and examine all of its papers, from the time of its organization, more than sixty years ago.

We submit that Congress had no such right in contemplation, and did not intend to authorize it. Why should the Commission, charged with the duty of enforcing the Interstate Commerce Act, which requires the charging of reasonable rates, and forbids discrimination, rebates, preferences, etc., desire in the year 1914 to go back and examine papers of the Louisville & Nashville Railroad Company made prior to the adoption of the Hepburn Act, more than eight years ago? What relevancy or materiality, so far as appears on the face of things, would old records and papers, made so many years ago, have to any present duty of the Commission?

And, in this connection, it may be well to call attention to the fact that if any book or paper, made prior to the passage of the Hepburn Act (or some paper not coming within the meaning of the terms "accounts, records and memoranda" as heretofore discussed), may be relevant or material to any matter, which the Commission is called on to act upon, its production may still be required and enforced by the process of *subpoena duces tecum* under the law as it existed prior to the adoption of the Hepburn Act and still exists. But we submit that Congress, in authorizing the Commission, by the language of the Hepburn Amendment, to prescribe forms for all accounts, records and memoranda, which provision must manifestly have been only prospective, meant only to give to the Commission the right of access to accounts, records and memoranda created after that date; the main purpose manifestly being to give the Commission the power to examine those accounts, records and memoranda for which it might prescribe forms, so as to see that its orders, in this respect, were complied with, and so as to get the information which the prescription of these forms was intended to provide for. In other words, the purpose of the Act, which became effective August 28, 1906, seems to be to make a change from that date in the keeping of the accounts, records and memoranda of common carriers, subject to the provisions of the Commerce Act, and to provide that thereafter they shall keep their accounts, records and memoranda in such forms as the Commission shall prescribe, and that the Commission shall have the right of access to these accounts, records

and memoranda, for which they are to prescribe forms.

Of course it is a familiar principle of construction that "courts refuse to give statutes retrospective construction unless the intention is so clear and positive as by no possibility to admit of any other construction" (Sedgwick's Construction of Statutes, 166; United States v. A. T. & S. F. R. Co., 142 Fed. 186); and while it possibly may be said with truth that to permit the Commission under this Act of August 28, 1906, to go back and merely examine accounts, records and memoranda, made previous to that date, would not be giving the Act a retrospective effect, yet the principle involved in the rule of construction referred to seems applicable to the consideration of the question now before us. For the rule is a mere rule of construction. It is not based on the constitutional prohibition against *ex post facto* laws, because they are declared to be invalid by the Constitution itself. But the rule of construction against retrospective legislation applies to legislation that *would be valid*, if it were clear that the legislative body *intended* to make its enactment retrospective. And in the case of the statute under consideration, we simply submit that it is not reasonable to suppose that Congress intended by the Act, which became effective August 28, 1906, to give the Commission the right or power to go back for an unlimited period of time and examine all accounts, records and memoranda made by interstate carriers at any time in the past, or at any time prior to the effective date of that Act.

VII.

UNREASONABLE SEARCH AND SEIZURE.

Finally, if, as a mere matter of construction, it be considered that the Commerce Act was intended by Congress to authorize such a search of defendant's papers as was demanded by the examiners of the Interstate Commerce Commission in the matter now under consideration, and as prayed for in the petition for mandamus in the case at bar, then we submit that it is violative of the Fourth Amendment to the Constitution of the United States, which declares:

> "The rights of the people to be secure in their persons, houses, papers and effects against *unreasonable searches and seizures,* shall not be violated, and *no warrants shall issue,* but upon probable cause supported by oath or affirmation, and particularly *describing the place to be searched,* and the persons or *things to be seized.*"

This court has held that corporations come within the protecting provisions of this constitutional amendment against *unreasonable* searches and seizures.

In Hale v. Henkel, 201 U. S. 43, the court said:

> "4. Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an Act of Congress passed in the exercise of its constitutional powers, can not refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity,

under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property can not be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. Gulf, etc., Railroad Company v. Ellis, 165 U. S. 150, 154, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

"We are also of the opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, *be he individual or corporation*, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union.

"If the writ had required the production of all books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte* Brown, 72 Missouri, 83; Shaftsbury v. Arrowsmith, 4 Ves. 66; Lee v. Angas, L. R. 2 Eq. 59." (Pages 75, 76, 77.)

It is true that the court also made the following statement in the opinion from which we have just quoted:

"Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by Act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment." (Page 77.)

Just exactly what the court meant by this last statement we do not clearly understand. But it could not have meant that *any* search in connection with interstate

commerce which Congress may attempt to authorize, however unlimited and however unreasonable, will be legal, because, as very pertinently said by Mr. Justice Harlan in his dissenting opinion in that case:

> "If the order of the court below is to be deemed invalid as an unreasonable search and seizure of the papers, books and records of the corporation, could it be deemed valid if made under the express authority of an Act of Congress? *Congress could not, any more than a court, authorize an unreasonable seizure or search in violation of the Fourth Amendment.*" (Page 79.)

And in a later case, Wilson v. United States, 221 U. S. 382, in discussing the status of the books and papers of a corporation, in a case, by the way, where *the corporation* was not insisting on any privilege of privacy, the court in speaking of a governmental demand for examination said:

> "That demand, expressed in lawful process, *confining its requirements within the limits which* REASON *imposes in the circumstances of the case,* the corporation has no privilege to refuse" (p. 382).

This language seems to us to have been intended to guard against *unreasonable* search of corporate papers.

Clearly, therefore, if the search which the examiners of the Commission sought to make, and the right to which they asked the court to enforce by the writ of mandamus in the case at bar, was an *unreasonable* search, a search which would have been held to be unreasonable if attempted to be enforced by the writ of *subpoena duces*

tecum or by a *search warrant,* then it was unreasonable if sought to be enforced either by physical force or by the writ of mandamus as in the present case.

The fundamental question to be considered and decided is as to whether or not the search attempted was an unreasonable search, and is not as to the mere manner of enforcing the right; the one is a matter of substance and the other is a matter of form only; and when the framers of the Fourth Amendment to the Constitution put it into that sacred instrument, they were concerned with matters of substance and not with mere matters of form; and the language of the amendment goes to the substance, and not to the form.

In Hale v. Henkel, in the language we have heretofore quoted, the court held that a *subpoena duces tecum* which commanded the witness to produce "all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union" was *"far too sweeping in its terms to be regarded as reasonable."* And the court said that "a general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms." But how much more sweeping and incapable of defense against illegal demands is the search sought to be enforced in the case

at bar? Nothing is excluded. The prayer is that the court, by its writ of mandamus enforce the right of an examiner of the Commission to enter any office of the defendant and to search and make copies from anything he pleases, without limitation or exception, and without any statement of purpose or reason. If there can be, within contemplation of law, an unreasonable search of the papers of a corporation, then surely this is an unreasonable search. If it is not, then there is no such thing. And this court has said there is such a thing.

In case of a *subpoena duces tecum* the papers referred to, and covered by the writ, can not be introduced in evidence, if objected to, until the right to put them in evidence has been determined by a court; and thus the owner of the papers has the benefit of judicial protection against any improper use sought to be made of his papers. But not so in the case of the character of search now demanded, and the writ of mandamus by which it is sought to be enforced. If the prayer of this petition be granted and a writ of mandamus in accordance therewith be issued, then the examiner of the Interstate Commerce Commission will be allowed to enter any office of the defendant, seize any paper he pleases, no matter what its character, read it, copy it, or make extracts from it, for the purpose of filing the same among the records of the Interstate Commerce Commission; and if any representative of the defendant objects to the examiner's right to inspect any particular paper or to copy it, or make other use of it, there is no court to determine that question. The examiner, a mere employee of the Interstate

Commerce Commission, itself a mere ministerial tribunal, is detective, inspector and judge, all in one person.

In fact, we understand that the Commission insists upon the right to make this search and examination without even letting any representative of the defendant know what is being examined—in other words, the right to make this unlimited examination of everything in the office, without even the right of any representative of the company to be present at the examination, so that the company shall not even know what the Commission's examiner is examining.

In the case *In re* Pacific R'y Commission, 32 Fed. Rep. 241, Judge Sawyer, in his opinion concurring with Mr. Justice Field in that celebrated case, and speaking of a commission created by Congress to examine into the affairs of the Central Pacific Railroad Company, which, by the way, was *a corporation,* said:

> "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a Commission without any allegations, upon no fixed principles, and governed by no rules of law or evidence, and no restrictions except its own will or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and *an intolerable tyranny*" (p. 263).

No more exact description of the authority claimed by the Interstate Commission in the case at bar could be written than in the words of Judge Sawyer, just quoted.

We do not know how to enforce our point by any argument that would make it plainer than the simple state-

ment of the demand insisted upon. The matter seems to us to come back to the original question, simply as to whether a corporation is, or is not, within the protection of the Fourth Amendment against unreasonable searches and seizures; because, as said before, if such a thing as an unreasonable search of a corporation's papers is a legal possibility, then the right of search here insisted upon is such. It will be observed from reading the petition in the case at bar that there is no statement that the defendant has violated any provision of the Interstate Commerce Act, nor even that it is suspected of having violated any provision thereof. On the contrary, as we have attempted to show in a previous part of this brief, the manifest object of the examination is to find out whether or not the corporation has violated the Sherman Anti-Trust Act. But the Government, and the Interstate Commerce Commission as a branch of the Government, now insist that the purpose of the examination is wholly immaterial; that the Commission has the right to examine any paper it pleases, for any purpose it pleases, or, without the statement of any purpose—in other words, the absolute, unlimited and uncontrollable right of search of the "houses, papers and effects" of this defendant. And we submit that no such right exists.

VIII.

GROUND OF THE DISTRICT COURT'S JUDGMENT.

In view of the foregoing discussion, the court will doubtless be better able to understand and appreciate the ground upon which the District Court overruled the motion for mandamus and dismissed the petition in the case at bar. The court, in its opinion, called attention to the fact that the petition did not indicate what the Commission desired to examine, and therefore gave the court no opportunity to determine whether any particular book or paper, which the Commission might desire to examine, was a proper subject of examination or not. The court said:

> "To grant the writ in the broad and general, not to say unlimited, terms asked for might indeed uphold plaintiff's contention as to the powers of the Interstate Commerce Commission, but might be perilously near the unreasonable search forbidden by the Constitution. If the plaintiff had propounded claims to relief in such separately stated propositions as were based upon a general, but exact, description of the class of records which had been demanded, but which the examiner had failed to obtain, we might then be able to discriminate and grant such parts of the relief sought as appeared to be proper, while denying the rest. But where the plaintiff asks an *unlimited roving commission* for the examiners, without making such specific averments as will enable the court to discriminate in its judgment between what may be properly granted and what not, we think no title to any relief is made clear by the plaintiff, who must adequately and sufficiently show its claim to be well founded, at least

in part. Here such confusion exists between what might be good and what bad that the court does not think it discreet to grant the writ prayed for as the case is now presented." (Record, 25.)

IX.

CONCLUSION.

In conclusion we submit that the District Court was certainly right in overruling the motion for a mandamus, and in dismissing the petition; but we submit further that the petition should have been dismissed absolutely, because, while the petition is vague and general, it does show that the only right of inspection refused was as to "accounts, records and memoranda" *existing prior to the effective date of the Hepburn Amendment,* August 28, 1906, and CORRESPONDENCE *subsequent to that date.*

It will be observed from the petition that it first states the refusal of defendant to give it "access to or opportunity to examine said accounts, records and memoranda of said defendant *made prior to August 28, 1906*" (Record, 6); and then, after stating the refusal of defendant to give "access to and opportunity to examine the accounts, records and memoranda kept by said defendant *on and subsequent to said August 28, 1906,* INCLUDING THE CORRESPONDENCE *received by said defendant on and subsequent to said date,*" it then adds this explanatory clause, to-wit:

> "*That is to say,* that said defendant and its said officers and agents failed and refused to give either to said Commission or to said Carleton, agent and

examiner as aforesaid, access to or opportunity to examine *said correspondence* received by said defendant *on and subsequent to said August 28, 1906.*" (Record, 6.)

It is true that following the foregoing statements of the petition it does add this extremely general statement:

> "And said defendant and its said officers and agents failed and refused to give, either to said Commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine *other* accounts, records and memoranda of said defendant made on and subsequent to said August 28, 1906." (Record, 6.)

But the bill of exceptions shows that the refusals of defendant were in writing, to-wit, in the form of letters, which letters are quoted in the testimony of the examiner of the Commission, and these show that so far as the period subsequent to August 28, 1906, is concerned, the refusal simply related to *correspondence* and to the records of destruction of papers "relating to papers prior to that date" (Mapother's letters of Feb'y 11, 1914, and Feb'y 12, 1914; Record, 30).

Respectfully submitted,

HENRY L. STONE,
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HELM BRUCE,
Attorneys for Defendant in Error.

November 30, 1914.

APPENDIX.

OPINION OF JUDGE SANFORD.

IN THE UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE.

UNITED STATES OF AMERICA,

vs. No. 1138 At Law.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

OPINION ON THE PLAINTIFF'S MOTION FOR A WRIT OF MANDAMUS.

The plaintiff's verified petition for a writ of mandamus alleged that this suit was instituted by the district attorney, under the direction of the Attorney General and at the request of the Interstate Commerce Commission; that the defendant is a common carrier engaged in interstate commerce and subject to the Interstate Commerce Act; that the Commission is, under Sections 12 and 20 of said Act, as amended, vested with certain powers and charged with certain duties as set forth in the petition, including, under Section 20, the right, at all

times, to have "access to all accounts, records and memoranda" kept by carriers subject to the Act and to "employ special agents, or examiners who shall have authority under the order of the Commission to inspect and examine" any and all of the same; that on November 6, 1913, the Senate of the United States adopted a certain resolution set forth in the petition (which fully appears in United States v. Louisville Railroad (D. C.), 212 Fed. 486, 489), whereby, in thirteen separate paragraphs, the Commission was directed to investigate and report to the Senate as to the relations between the defendant and the Louisville & Nashville Railroad, and the relations and conduct of these and other railroads in respect to various matters set out in the resolution, including, in the last paragraph, the number of free passes issued by the defendant, since January 1, 1911, to public officials, or at their request, with the total mileage and money value thereof; that the Commission for the purpose of enabling it to perform the duties imposed upon it by the Act had appointed two special agents and examiners and "duly authorized them to inspect the accounts, records and memoranda" of the defendant; that on February 6, 1914, the Commission, through one of said agents and examiners, had applied to the defendant "for access to and opportunity to examine the accounts, records and memoranda kept by said defendant, including the correspondence received by said defendant and copies of correspondence sent by said defendant and also the indices pertaining to said correspondence and copies"; that the defendant had failed and refused to give the Commission

or its said agent and examiner, access to or opportunity to examine the same, "namely, said correspondence and copies of correspondence and indexes thereto"; that in many instances the only detailed account, record and memorandum of a transaction relating to the defendant's business as a common carrier kept by it, is contained in the said correspondence and copies; and that "in pursuance of said Commission's duty under the law, and in obedience to said resolution of the Senate hereinabove set out, and to enable said Commission to perform the functions for which it was created," it was the duty of the Commission to obtain access to and examine through said agents and examiners all of said accounts, records and memoranda, including said correspondence, copies and indexes, and the duty of the defendant to give it and them such access and opportunity of inspection. Wherefore, the plaintiff prayed the court to issue a writ of mandamus commanding the defendant to comply with said provisions of the Interstate Commerce Act, and to give the Commission, its agents and examiners, access to its accounts, records and memoranda, including said correspondence, copies and indexes, and an opportunity to examine the same, and "also opportunity to inspect and examine any and all other accounts, records and memoranda, including correspondence, copies of correspondence, indexes to such correspondence and other indexes kept by said defendant"; and for general relief.

The affidavit of said special agent and examiner, which was filed with the petition, set forth the demand made by him upon the defendant for access to and oppor-

tunity to examine its accounts, records and memoranda, including said correspondence, copies and indexes, and the refusal of the defendant to give him, as such special agent and examiner, either access to or opportunity to inspect and examine the same, namely, said correspondence and copies of correspondence and indexes thereto.

The defendant's verified answer alleged that on November 10, 1913, the Commission had passed an order, set forth in the petition, instituting an investigation concerning the matters set forth in said Senate resolution, which was served upon the defendant and "is the order of the Commission for the examination mentioned in the petition"; that about February 2, 1914, two examiners of the Commission had reported at the defendant's offices and were given access to its "accounts, records and memoranda" as contemplated in Section 20 of the Interstate Commerce Act; that they subsequently demanded the privilege of examining all papers relating to the issuance of free transportation, and while the defendant did not recognize their authority to inspect said papers, it had nevertheless complied with said demand and furnished them the list of those to whom annual passes had been issued, the stubs showing to whom trip passes had been issued, and all correspondence relating thereto; that about February 6, 1914, one of said examiners applied to the defendant for complete and unlimited access to and opportunity to examine the general correspondence files and indexes pertaining thereto, in the offices of the President and General Manager, the Vice President and Traffic Manager, and other officers and agents of the

defendant; that this application and demand was refused; that said examiner made no demand for any special or particular files of correspondence, but his demand was a general one to have complete, full and unlimited access to the correspondence files and their indices, and this was the only demand of said examiner which was refused by defendant; that the "accounts, records and memoranda" to which the examiners were given access under Section 20 of the Act did not embrace such correspondence or indices; that the defendant's general correspondence files contained private and confidential communications between its various officers and agents relative to its internal affairs, its proposed constructions and extensions, and a variety of other subjects of a private, confidential nature which did not in any way relate to the provisions of the Interstate Commerce Act or any other Act as to whose enforcement any duty had been imposed upon the Commission, and also contained confidential, private and privileged communications between the defendant and its attorneys; that the only detailed account, record and memorandum of a transaction relative to its business as a common carrier was not in many instances contained in such correspondence and copies; and it was not the duty of the Commission to obtain access to or examine, through its agents and examiners, defendant's said correspondence, copies of correspondence and indices, and not the duty of the defendant to give said examiners access thereto; that the first twelve paragraphs of said Senate resolution, as embraced in the aforesaid order of the Commission, involve matters

wholly foreign to the authority, duties and obligations of the Commission under the Interstate Commerce Act, and are beyond the purview and jurisdiction of the Commission and pertain wholly to the enforcement of the Anti-trust Act, as to which there is no duty imposed upon the Commission; that four of said paragraphs pertain to matters as to which the defendant is in no way concerned or connected; that as to the inquiries made in the thirteenth paragraph in regard to passes, the defendant had furnished information to the examiners, as stated; that Section 20 of the Interstate Commerce Commission Act authorized the Commission to prescribe the forms of any and all "accounts, records and memoranda" to be kept by carriers subject thereto, and that, under said provision, the Commission had prescribed a uniform system of railway accounting, including orders as to the Classification of Operating Expenses, of Expenditures for Road and Equipment, of Revenues and Expenses for Outside Operations, of Locomotive Miles, Car Miles and Train Miles, and of Expenditures for Additions and Betterments, and Forms of General Balance Sheet Statement and of Income and Profit and Loss Statement, and had thereby prescribed in detail a general accounting system for all carriers subject to the Act; that the defendant had complied with all the forms that had been prescribed by the Commission, and the Commission and its examiners had had full and complete access to same; that the Commission had never undertaken to prescribe any forms for correspondence between officials of the various departments of the defendant, or be-

tween such officials and officials of other carriers or the general public, and that obviously forms for correspondence could not be prescribed; that said Senate Resolution could not confer upon the Commission or its examiners any authority which the Commission did not have under the Interstate Commerce Act and its amendments; that the demand for a general inspection of all the defendant's indices and correspondence was in violation of the provision of the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures; and that if the Interstate Commerce Act should be construed as conferring upon the Commission and its examiners the authority to have access to all such correspondence files and indices, it is unconstitutional and in violation of said amendment.

The motion for the issuance of a writ of mandamus, which follows literally the prayer of the petition, was heard upon the petition and supporting affidavit, the answer, and a copy of the Commission's order of November 10, 1913, instituting an investigation of the matters set forth in the Senate resolution. Being thus heard upon the pleadings the motion is equivalent to a demurrer to the answer, and admits, for present purposes, the truth of all averments of fact well pleaded therein. Merrill v. County Treasurer, 61 Mich. 95, 97; Board v. Board of Supervisors, 51 Miss. 542, 544; Ward v. Flood, 48 Cal. 36, 46; State v. Adams, 161 Mo. 349, 362; Harris v. State, 96 Tenn. 496, 513; High Extraordinary Legal Remedy (3d Ed.) Sec. 527, p. 490. And see Matter of Steinway, 159 N. Y. 250, 254.

It is to be noted, at the outset, that neither the petition nor supporting affidavit alleges, in effect, any refusal by the defendant to give the examiner access to any of its "accounts, records and memoranda" other than correspondence received, copies of correspondence sent and the indices thereto. And since the answer alleges that the Commission and its examiners have had complete access to all the defendants "accounts, records and memoranda" kept in accordance with the forms prescribed by the Commission, and that the examiners have also been furnished with all correspondence relating to the issuance of passes, and that the only demand made by the examiner which the defendant refused was a "general" demand to have "complete, full and unlimited access" to its general correspondence files and the indices thereto (a fact which was not denied at the hearing), it is clear that the sole issue now presented is as to the plaintiff's right to a writ of mandamus compelling the defendant to allow such unlimited access to its general correspondence.

It is well settled that in the absence of statutory authority, the district courts of the United States can not issue the writ of mandamus, as an original and independent remedy, and are limited to its use as a process in the enforcement of rights in aid of a jurisdiction previously acquired by the court for other purposes. Heine v. Levee, Commissioners, 19 Wall. 655, 660; Smith v. Bourbon County, 127 U. S. 105, 112; United States v. Louisville Railroad (D. C.) *sup.* at p. 492. The plaintiff's right to the issuance of the writ in the present case must there-

fore rest, if it exists at all, upon the provision in Section 20 of the Interstate Commerce Act that the district courts of the United States "shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to Regulate Commerce or of any act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said acts, or any of them."

It is earnestly insisted by the defendant, *in limine*, that under the general averments of the petition (which nowhere specifically alleges that the Commission has by any "order" authorized its agents and examiners to inspect the defendant's accounts, records and memoranda for any purpose coming within the provisions of the Interstate Commerce Act, or states the specific objects of the examination of the defendant's correspondence sought to be made by the examiners), and in view of the allegation in the answer that the order of the Commission instituting an investigation into the matters set forth in the Senate resolution (which does not direct any investigation by means of examiners) it must be held, under the rule of pleadings above stated, that the sole order of the Commission authorizing the examiners to inspect the defendant's correspondence is one made for the purpose of carrying out the investigation directed by the Senate resolution, and that as this resolution is not a law of the United States and does not enlarge in

any manner the authority or jurisdiction of the Commission under the Interstate Commerce Act, the defendant's refusal to permit an examination of its correspondence under such order and for such purpose would not, in any event, be a violation of any provision of the Act, and that, hence, all other questions aside, there would be no authority under Section 20 of the Act for the issuance of a writ of mandamus as prayed. Without, however, determining this question, which depends primarily upon a narrow question of pleading, whose solution is rendered unsatisfactory by the somewhat general and vague nature of the allegations of both the petition and answer, I think it proper, in view of the importance of the question involved on the merits of the case, to proceed to its consideration, upon the assumption, for present purposes, that, upon this motion, it sufficiently appears that the examiner to whom access to the defendant's general correspondence was refused, had, by proper order of the Commission been duly authorized to inspect the accounts, records and memoranda of the defendant for the double purpose of performing the general duties devolving upon the Commission under the Interstate Commerce Act, and of making the specific investigation directed by the Senate resolution. It is clear, however, that the Senate resolution, which does not appear to have either been concurred in by the House of Representatives, or approved by the President, is not a law of the United States, and does not, as was conceded at the hearing, enlarge in any manner the authority or jurisdiction of the Commission under the Interstate Commerce Act.

United States v. Louisville Railroad (sup.) at p. 492. Obviously, therefore, in so far as the examination sought to be made by the Commission for the purpose of carrying out the investigation directed by the Senate resolution, did not fall within the general authority of the Commission, independently of such resolution, the defendant's refusal to permit an examination of its correspondence for such purpose, would not be a failure to comply with any provision of the Interstate Commerce Act or a violation thereof, or constitute a ground for the issuance of the writ of mandamus herein. United States v. Louisville Railroad (D. C.) *sup.* at p. 402. And, in its ultimate analysis, the plaintiff's right to the issuance of the writ must hence in this aspect of the case depend upon the question whether, under the Interstate Commerce Act, the Commission is authorized in the general performance of its duties to obtain, through its duly authorized examiners, access to the general correspondence of the defendant and opportunity to examine same, and, consequently, whether in denying such access and opportunity for examination, the defendant has violated any provisions of said Act. If so, independently of other considerations, the plaintiff is entitled to the writ of mandamus; otherwise not.

The provisions of Sections 12 and 20 of the Interstate Commerce Act, in so far as pertinent to the consideration of this question, are, in substance, as follows:

Section 12 of the Act, as amended, provides "That the Commission * * * shall have authority to inquire into the management of the business of all common car-

riers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of this Act and for the punishment of all violations thereof * * * and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, tariffs, contracts, agreements, and documents relating to any matter under investigation. * * * And in case of disobedience to a subpoena the Commission * * * may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

Section 20 of the Act, as amended, authorized the Commission to require annual reports, under oath, from all common carriers subject to the Act, which shall show in detail their receipts and expenditures and various other specified matters and "also contain such informa-

tion in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require"; to "prescribe the manner in which such reports shall be made and to require from such carriers specific answers to all questions upon which the Commission may need information"; and also to require any or all of said carriers, by general or special orders, to file periodical or special reports, under oath, "concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce"; the failure to file said annual reports, or any of such periodical or special report or to make specific answer to any such authorized question, within the time required, subjecting the carrier to a forfeiture of one hundred dollars for each day of default.

Section 20 (as amended by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 484, 593) further provides that: "The Commission may in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept. * * * "The Commission may, in its discretion, prescribe the forms of any and all accounts, records and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records and memoranda of the movement of traffic, as well as the re-

ceipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records and memoranda kept by such carriers * * * in case of failure or refusal on the part of any such carrier * * * to keep such accounts, records and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners," such carrier shall forfeit five hundred dollars for each day of the continuance of such offense. "Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter or * * * falsify the record of any such account, record or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor," and shall be subject to a fine of from one thousand to five thousand dollars or imprisonment from one to three years, or both; "Pro-

vided" (as amended by the Act of February 23, 1909, c. 193), "that the Commission may at its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved."

It will be observed that these sections deal with several separate and distinct matters, namely, the right of the Commission, under Section 12, to obtain "information" from the carriers, and to compel, by subpoena, witnesses to testify and produce documentary evidence; its right, under Section 20, to require the carriers to file annual, periodical or special reports, concerning matters within the scope of the Commission's duties, and to require specific answers to questions, and, finally, under Section 20, its right to have direct access to the "accounts, records and memoranda" kept by the carriers and to inspect the same through its examiners. All of these provisions, however, except the last, relate either to information furnished to the Commission by the carriers, through reports or answers, or to information obtained by it through the process of subpoena; and only the last relates to its right of direct access to records in the possession of the carriers for the purpose of an independent examination. The present case involves only the extent of the last-mentioned right; and the crucial question is as to the true scope and meaning of the words "accounts, records and memoranda" as used in this clause of Section 20 of the Act.

The provisions of this section of the Act in reference to the "accounts, records and memoranda" to be kept by common carriers are to be construed in the light of the well-settled principles governing the construction of statutes in derogation of the common law and of a penal nature; and they are to be read not only in connection with the other provision of the Act, above mentioned, in reference to the obtaining of information by the Commission through other methods than direct examination, in which broad language is used in marked contrast to the limited phrase, "accounts, records and memoranda," but also, in such manner that, if reasonably possible, these words may be given the same meaning wherever used, and a harmonious and consistent construction given to the several provisions of the Act in reference thereto.

After careful consideration, I have reached the conclusion that the "accounts, records and memoranda" of common carriers to which the Commission is given the right of access and examination are those whose form it is, by the sentence immediately preceding, authorized to prescribe; and that the phrase "accounts, records and memoranda" as used in this section of the Act does not relate to corespondence or other original papers or documents in the possession of the carriers, constituting part of their business acts and transactions, but to the records of such acts and transactions, including the movements of traffic as well as accounts of receipts and expenditures, which the carriers are required to enter "on the books and in the manner" and forms which the Commission may prescribe, constituting book entries of their acts and

transactions, in the nature of a general system of accounting, which shall be at all times subject to inspection and examination by the Commission.

In Harriman v. United States (U. S.), *sup.* at p. 421, such "accounts, records and memoranda" are referred to, in general terms, as "accounts"; and in Interstate Commission v. Goodrich Transit Co., 224 U. S. 194, they are variously designated as "a system of accounting" provided in the orders of the Commission (p. 211) "accounts to be kept in a uniform way and to be open to the inspection of the Commission" (p. 211), "accounts" (p. 211) and as a "general form of accounting" (p. 212); and in Kansas City Railway v. United States, 231 U. S. 423, reference is made to the "declared object of standardizing railroad accounts" (p. 440) and to the purpose manifested by Congress "to standardize and render uniform the accounts of the different carriers both with respect to matters that enter into property and the improvements thereof on the one hand and the current operations of the companies on the other." (P. 442.) It further appears that all of the provisions in question in reference to the "accounts, records and memoranda" of common carriers, which were incorporated by the Act of 1906 as an amendment to the Interstate Commerce Act, are derived, in literal and exact terms, from the draft of a bill admitted to Congress by the Commission, in 1905, the passage of which it recommended; and that in recommending to Congress the adoption of this amendment the Commission entitled that portion of its report dealing with this matter "*Examination of Books of Ac-*

count," and under this heading said: "An efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe the form in which books of account shall be kept by railways, with the right on the part of the Commission to examine such books at any and all times through expert accountants. This recommendation has been urged upon the attention of Congress in previous reports, and we earnestly renew it at this time. Probably no one thing would go further than this toward the detection and punishment of rebates or kindred wrongdoing." (Nineteenth Annual Report of Interstate Commerce Commission, 1905, at pp. 11, 177 and 182.)

I can not believe that Congress in adopting the amendment thus recommended for the purpose of giving the Commission authority "to prescribe the form in which books of accounts shall be kept by railways" and to examine "such books" at all times through expert accountants, contemplated that such amendment would give the Commission the right of free and unlimited access at all times, to the entire general correspondence of the railways, upon all subjects whatsoever, however remote from the purposes of the Act or foreign to the province of the Commission, and including, it is to be noted, letters sent to the carriers by their correspondents, as to which the Commission could obviously prescribe no form. There are in the Act, as thus amended, no words indicating this intention on the part of Congress, such as a general provision giving the Commission the right to inspect all correspondence of carriers subject to the

Act, or all their books, papers and documents, or other apt words of general and unrestricted import; and nothing, in short, that in my opinion, indicates or suggests such intention, I am therefore constrained to conclude that such right of examination of the general correspondence of the carriers is not conferred upon the Commission by Section 20 of this Act, although the inspection thereof may be obtained by the Commission under writ of subpoena in the instances and for the purposes coming within the provisions of Section 12 of the Act. (See Harriman v. United States (U. S.), *sup.* And while apparently the effect of the proviso incorporated in Section 20 of the Act of 1909 is to confer upon the Commission, by implication, the additional right to examine such "records, books, blanks, tickets, stubs or documents" of a carrier, relating to "operating, accounting, or financial" matters, as it may, by orders require to be preserved, this obviously does not confer upon the Commission any right to inspect a carrier's general correspondence which is neither alleged nor shown to contain any document of this character.

It therefore follows that, in the instant case, the defendant in refusing the examiner access to its general correspondence files, as demanded by him, neither failed to comply with, nor violated, any provision of the Interstate Commerce Act or of its amendments; and that hence the plaintiff is, all other considerations aside, not entitled under the Act, to the writ of mandamus sought.

Being of opinion that, for this reason, the plaintiff is not entitled to the issuance of a writ of mandamus to

compel the inspection of the defendant's correspondence, it is hence unnecessary to determine whether, if otherwise entitled, such writ should, in the instant case, be denied, in the exercise of the discretion vested in the court in the granting of a writ of this character, either upon the ground that the examination appears to be sought, in part at least, for an unauthorized purpose, that is, the investigation of many matters set forth in the Senate resolution, which, it is insisted, are entirely beyond the scope of the Commission's authority; or because of the broad and sweeping character of the demand made upon the defendant, overstepping, it is insisted, the limits of a reasonable search. See 26 Cyc. 147, 150; United States v. Louisville Railroad (U. S.) *sup.* at p. 494.

For the reasons stated, however, an order will be entered denying the plaintiff's motion for the issuance of the writ.

SANFORD, *Judge.*

September 4, 1914.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 499.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, ATTORNEY GENERAL, PLAINTIFF IN ERROR,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF FOR DEFENDANT IN ERROR.

HENRY L. STONE,
WILLIAM A. COLSTON,
EDWARD S. JOUETT,
HELM BRUCE,
For Defendant in Error.

December 9, 1914.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 499.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, ATTORNEY GENERAL, PLAINTIFF IN ERROR,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF FOR DEFENDANT IN ERROR.

In a brief lately filed by counsel for the Interstate Commerce Commission much is said about the "visitatorial" powers exercised over corporations, and this term is applied to the power under which it is sought to justify the unlimited demand of the Interstate Commerce Commission for access to all books, correspondence, and other character of papers belonging to the defendant corporation.

We submit that not much advance is made toward a clear understanding of the nature and extent of the power which Congress or the Commission, under authority of Congress, has in the matter of the examination of such papers by calling the power "visitatorial." This is a common-law term

applied to the power which a "visitor" of a corporation exercised, and, as we understand the nature of the power of a visitor, or the visitatorial power, it was a judicial power, the power to determine controversies over the appointment or removal of officers, or charges of mismanagement, or of departure from the purposes fixed by the charter of the corporation, or the rules laid down for its government, and matters of similar nature.

The most oft-quoted opinion to be found in the books on the subject of visitatorial powers is that of Lord Holt in the celebrated case of Phillips *vs.* Bury, 2 Term Rep., 346, of which this court, speaking by Mr. Justice Story, in the Dartmouth College case, said: "The nature and extent of this visitatorial power has been expounded with admirable fullness and accuracy by Lord Holt in one of his most celebrated judgments." And in this case Lord Holt expressly states that a visitation is a judicial proceeding, and he treats the visitor as a judge and his determination as a judgment. That was a case in which the Bishop of Ely had removed Dr. Bury from the office of rector and the question was as to the effect of that act. The act of removal had been done in July, but there had been a previous proceeding in June, and, as the number of visitations which the Bishop could make was limited, it became important to consider the nature of the action taken in June, and, on that subject, Lord Holt said:

> "Then the next thing to be considered is whether that which was done on the 16th of June was visitation. * * * It would be very absurd to construe his coming there to visit to be a visitation, *which imports a judicial proceeding*" (page 349). (Our italics.)

Then again, in speaking of the duties of a visitor, his Lordship said:

> "A visitor being then of necessity created by the law, every hospital is visitable, either by the patron,

> if a law hospital, or by the ordinary, if spiritual. What is the visitor to do? He is to *judge* according to the statutes and rules of the college. He may expel and he may deprive" (page 353). (Our italics.)

And again, on the same subject, he says:

> "I thought we had been come to some certainty at law since that case of Appleford, that where there is a visitation and he hath power to proceed to deprivation, this court ought to give credit to the justice of his proceedings, *as much as to those of any judge;* and I remember that my Lord Hale took it for clear law, that such a sentence was as strong as a judgment of an assize to bind the party deprived. *He is made a judge,* and particularly designed by the founder. But he hath his authority from the law, and he is to *judge by the statutes* (page 356). (Our italics.)

Again this language is used in the opinion:

> "And as he" (the founder) "is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the actions and regulate the behavior of the members that partake of the charity; for it is fit the members that are endowed and that have the charity bestowed upon them should not be left to themselves (for divisions and contests will arise among them about the dividend of the charity), but pursue the intent and design of him that bestowed it upon them" (page 352).

By this language last quoted we understand Lord Holt to mean that the visitor is to determine all divisions and contests among the members of the corporation, or those for whose benefit it is created, and all questions of departure from the purposes or rules of the corporation, very much as a court of equity supervises an ordinary trust, and that in the language heretofore quoted from the previous part of the opinion "a visitation * * * imports a judicial proceeding."

That such is the character of the visitatorial power is also clearly shown by the case of The King *vs.* The Bishop of Ely, 2 T. R., 290. There it appeared that the Bishop of Ely was authorized to appoint a master of Peterhouse College, Cambridge, from two persons to be nominated and presented to him by the fellows of the college. He was also visitor of the college. The fellows did nominate two men and presented their names to the Bishop, who, however, appointed a third man. Thereupon, a rule was issued against the Bishop in the court of King's Bench to show cause why a mandamus should not issue commanding him to appoint one of the two nominees of the fellows. It was insisted in opposition to the rule that his appointment was the exercise of his visitatorial power, and, therefore, could not be questioned by the court. But the three judges of King's Bench, in separate opinions, all held that his act of appointment was not by virtue of his visitatorial power, and that he, himself, recognized this by the manner of his proceeding, because he did not give notice or a hearing on the subject. Mr. Justice Buller, in his opinion, said:

> "That the Bishop of Ely is the visitor of Peterhouse is clear, and it is equally clear that this court has no jurisdiction to enquire into acts done by a visitor as such. * * * The first point to be considered in this case is, whether the act done by the Bishop and which is the subject of the present complaint were or were not a visitatorial act. Secondly, if it were not, whether it can now be enquired into and redressed by him as visitor, supposing it to be wrong? As to the first point, I think there is not the smallest pretense or foundation for saying that the Bishop appointed Mr. Longmire in his capacity of visitor. * * * His proceedings, therefore, have not even the show of a visitation; for whenever that is intended, the parties whose conduct or whose rights are objected to, should be heard, or, at least, convened before him, and have an opportunity of being heard; but, in the present instance, this ceremony was totally omitted" (pp. 337, 338).

In Tudor on Charities and Mortmain, the author has quite an extended discussion of the subject of "visitation," as applicable to eleemosynary corporations, from all of which it is clear that the power of visitation is of a judicial nature. He says: "The visitatorial tribunal, as has been already indicated, is a domestic forum, it is the *court of the founder*" (p. 68). He has one paragraph in which he says: "The ordinary duties of a general visitor comprise the election and amotion of corporators such as the master and fellows of a college," etc.; but when the authorities cited under this paragraph are read, it will be found that they all involve *controversies* over elections (involving usually questions of eligibility), or amotions, or charges of mismanagement, or of departure from the purposes of the charity, matters which either had been taken up before the visitor, or which the courts held ought to have been taken up before him; such as Attorney General *vs.* Talbot, 3 Atk., 662, involving the election to a fellowship by the masters and fellows of Clair-Hall, it being contended by the complainant that the person elected was ineligible, and wherein the Lord Chancellor determined that this was a question which should have been submitted to the visitor of the college; or again, the case of Phillips *vs.* Bury, 2 Tr., 346, heretofore mentioned; or again, Dr. Bentley's case (Bentley *vs.* Bishop of Ely, 2 Brown's Cases in Parliament, 2d ed., p. 220), where the Bishop heard charges against Dr. Bentley and expelled him; or again the case of *Ex parte* Berkhampstead Free School, 2 Vesey and Beam, 134, involving a complaint of maladministration.

It is commonly said that only ecclesiastical and eleemosynary corporations are subject to visitation, and that civil lay corporations are not thus subject. Blackstone, however, explains that statement as follows:

> "The King being thus construed by law visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction: *which is the court of King's Bench;* where, and where only, all misbehaviors of this kind of corporations

> are enquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers when they say that these civil corporations are liable to no visitation; that is, that the law, having by immemorial usage appointed them to be visited and inspected by the King, their founder, in *His Majesty's Court of King's Bench*, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority" (1 Blackstone's Com., star page 481).

So in Bacon's Abridgment it is said:

> "Spiritual corporations are visited in ecclesiastical matters by the ordinary; ecclesiastical corporations are subject to the visitation of the founder, his heirs or assigns, and other civil corporations to that of the King *in his court of King's Bench*" (2 Bacon's Abridgment (Bouvier's edition), page 477).

And so Chancellor Kent, in his Commentaries, says:

> "The visitation of civil corporations is by the government itself *through the medium of the courts of justice.*"

In MacKenzie *vs.* Trustee of Presbytery of Jersey City, 67 N. J. Eq., 652, the Court of Errors and Appeals of New Jersey, said:

> "Corporations only are visited, and these within three classes—ecclesiastical, civil, and eleemosynary. * * * Civil corporations were such as were created for a variety of temporal purposes. * * * Trading companies, for the advancements of manufacture and commerce * * * these were subject to the jurisdiction of the King's Bench; that is to say, to the visitation of the Crown, exercisable in that court" (pages 678, 679).

These authorities seem to show that the function of the visitor at common law was always considered a judicial function, and that the examinations made of the corporation by

the visitor were in the exercise of this judicial function, or, in other words, that the visitatorial power was a judicial power, exercised either, in the case of an ecclesiastical or eleemosynary corporation, by some natural person, holding the office of a visitor, or, in the case of a lay corporation, by the court of King's Bench, or later, it seems, by the Lord Chancellor, acting for the King.

Moreover, another thing with reference to the "visitor," as known at common law, is certain, to wit: *That he was the founder of the corporation*, or his heir or appointee. In case of an eleemosynary corporation, the founder was generally a private person, and, in the case of a lay corporation, it was the King. There was no such thing at common law as the visitation of a corporation by one other than the *founder*, or his heir or appointee, or, in case of the King, one of his courts.

Furthermore, the jurisdiction of the visitor of a corporation was confined to the internal affairs of the corporation, such as the election or removal of officers, or questions of violation of or departure from the purposes of the corporation. *No charge of violation by the corporation of the general law of the land could ever be tried by any visitor, or in the exercise of any visitatorial power.* Such matters could only be tried in the court of King's Bench, exercising other than visitatorial powers. On this subject Bacon says:

> "Where the public laws of the land are disobeyed, the court of King's Bench will interfere, notwithstanding there be a visitor; for his province is confined to the private statutes and domestic regulations" (2 Bacon's Abridgment, 480; Rex *vs.* St. John's College, 4 Mod., 233).

And this court, in comparatively late years, has had occasion to consider the general nature of visitatorial powers in the case of Guthrie *vs.* Harkness, 199 U. S., 148, in which a stockholder of a national bank was insisting upon the right to examine the list of the stockholders of the bank

and in which the bank insisted that this was prohibited by section 5241 of U. S. Revised Statutes, which, referring to national banks, provides that "no association shall be subject to visitorial powers other than such as are authorized by this title, or are vested in the courts of justice." This court held that the right of a stockholder to examine the books of a corporation was in no sense the exercise of "visitorial power," referring to certain of the authorities which we have already mentioned. And, in the course of the opinion, the court said:

> "The right of visitation being a public right, existing in the State for the purpose of examining into the conduct of the corporation *with a view to keeping it within its legal powers*, Congress had in mind in passing this section that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and authorizing the appointment of a receiver to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no State law or enactment should undertake to exercise the right of visitation over a national corporation, except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.
>
> "That the statute did not intend in withholding visitorial power to take away the right to proceed in courts of justice to enforce such recognized rights, as are here involved, is evident from the language used. If the right to compel the *inspection of books* was a well recognized common law remedy, as we have no doubt it was, it would belong to that class 'vested in courts of justice,' which are expressly excepted from the inhibition of the statute" (page 159). (Our italics.)

The court here seems to recognize two propositions: (1) that visitorial power is a power exercised by the creator of a corporation, "with a view to keeping it within its legal

powers," that being peculiarly the province of the creater or founder of a corporation, and (2) that "the right to compel the inspection of books," if included in visitorial powers, as the terms are used in the statute, would belong to that class *vested in courts of justice*.

Our purpose in referring to the authorities on the subject of "visitors" and "visitation" and "visitatorial powers," or, as the term is written in these days, "visitorial" powers, is to show that in no proper sense, according to the meaning of those terms, as they were known at common law, can the power claimed by the Interstate Commerce Commission, under the act of Congress, to personally examine the books of the Louisville & Nashville Railroad Company, a corporation created by the State of Kentucky, be called a "visitatorial" power. It is a power sought to be exercised, (1) not in the performance of any judicial function; (2) not by the creator or founder of the corporation, and, (3) not for the purpose of determining the validity or regularity of any internal proceeding, or to determine whether or not it is keeping within the limitations of its charter; but it is a proceeding wholly disconnected from the exercise of any judicial power, and is a proceeding by a State other than the State which created the corporation, and is a search for evidence of the violation, not of some internal regulation or charter limitation, but of the general law of the United States.

Plainly, therefore, this power here claimed is not the exercise of "visitatorial" power, as the meaning of that term has become fixed in the law, and nothing is gained by calling it such, and whatever power the United States has in the matter is simply that power which every State has to see that its laws are obeyed by those who are within its borders, a power which is exercised not only with reference to corporations, but with reference to natural persons; a power exercised, it is true, in different ways to meet differing conditions, but always and necessarily subject to the limitations of the Constitution.

And this leads us to refer briefly to a statement near the conclusion of the brief of the Solicitor General, in which, referring to the asserted powers of the Interstate Commerce Commission to enter any office of a railroad company and to examine anything it pleases for any purposes it pleases, and referring to the defendant's insistence that this is a violation of the Fourth Amendment, he says:

> "Having the power to regulate, Congress must also be held to have the power to determine what means are appropriate for carrying into effect its control" (page 43).

As we understand the proposition here advanced, reading it in the connection in which we find it in the brief, it is that because Congress has the power to regulate interstate commerce, it has the power, unfettered and unlimited by the provisions of the Fourth Amendment to the Constitution, to determine what means are appropriate for carrying into effect the control which Congress has over interstate commerce.

This is, in effect, an assertion that because Congress is by the Constitution given power to enact laws upon a certain subject, it is, therefore, freed from the limitations imposed upon its power by that very Constitution. In this connection we call attention to the fact that Congress has power to regulate the revenues of the Government and to pass laws imposing taxes, both in the form of tariffs and internal-revenue taxes, and to make regulations concerning the same. It also has power to pass laws regulating post-offices and post-roads. All of which powers it has exercised in great detail. Are we to understand, then, that in the exercise of these powers, which are just as clear as the power to regulate commerce, Congress is not subject to the limitations of the Constitution? Of course, this cannot be and is not true. In fact, in the very opinion to which the Solicitor General refers in connection with the statement heretofore quoted from his brief, to wit, Flint *vs.* Stone-

Tracy Co., 220 U. S., 107, 176, quotation is made from McCulloch *vs.* Maryland, 4 Wheat., 421, in which the court, by Chief Justice Marshall, said:

> "Let the end be legitimate, let it be within the language of the Constitution, and all means which are appropriate, and which are plainly adapted to that end, and *which are not prohibited, but are exercised with the letter and spirit of the Constitution* are constitutional" (page 176). (Our italics.)

And we may remind the court that in the great case of Boyd *vs.* United States, 116 U. S., 616, the order for the production of papers made by the district court in that case, and which this court held called for unreasonable search and seizure of the defendant's papers, was an order made strictly in accordance with a provision of an act of Congress, which act this court held to be void, it being an act concerning the enforcement of the tariff laws.

And in the late case of Weeks *vs.* United States, 232 U. S., 383, in an opinion delivered by the same member of the court, Mr. Justice Day, who delivered the opinion in Flint *vs.* Stone-Tracy Co., *supra*, the court, in holding that the Fourth Amendment of the Constitution had been violated by a search and seizure of Weeks' papers by a United States marshal in an endeavor to punish a violation of the laws against lottery, quoted with approval the language of the court in Bram *vs.* United States, 168 U. S., 532, with reference to the Fourth and Fifth Amendments, as follows:

> "It was in that case" (the Boyd case) "demonstrated that both of these amendments contemplate perpetuating, in their full efficiency, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country, only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, *free from the possibilities of future legislative change*" (page 391). (Our italics.)

And again in the same case the court said:

> "The effect of the Fourth Amendment is to put the courts of the United States *and Federal officials*, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority and to forever secure the people their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, *and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of law*" (page 31.) (Our italics.)

And while the court thus strongly states the controlling force of this provision over all persons entrusted with the enforcement of Federal laws, it likewise states in strong terms the history, meaning and effect of the Fourth Amendment. After referring to the practices which had prevalid in England of issuing "general warrants" for the search of premises and the practice in the American colonies of issuing what were called "writs of assurance," the court says:

> "Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded *by any general authority* to search and seize his books and papers" (page 390). (Our italics.)

The shield of this "fundamental law" protects corporations, as this court has held, and, as said before, it is impossible to conceive of a more *"general authority* to search and seize books and papers" than is claimed, and sought to be enforced by mandamus, in the case at bar.

If it be claimed—though we do not know that it is—that there is here no attempt to "seize" the books and papers, we say *there is*, just as much so, certainly, as in Boyd *vs.* United States, 116 U. S., 616, where the statute, under which

the order for the production of the papers was issued, expressly provided that *the owner of the papers should remain in custody of them,* except pending this examination, and furthermore that he should have the right to be present when they were being examined (p. 620). Of this procedure Mr. Justice Bradley eloquently said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*" (p. 635).

And in conclusion it may be remarked that when an interstate commerce examiner, over the objection of the owner, takes into his possession, from its accustomed place, a file of correspondence, keeps it as long as he pleases, reads, copies it, or makes extracts from it to be sent to the Commission, this is both in letter and in spirit a "seizure." The Constitution says nothing about how long the possession resulting from the seizure may or may not last. It says the seizure shall not be made at all.

Counsel for the Commission refers to Hammond Packing Company *vs.* Arkansas, 212 U. S., 322, as bearing on this question of unreasonable search and seizure, that being the case where the court struck from the files the answer of defendant for failure to obey an order for the production of books and witnesses. But the Supreme Court of Arkansas, from which the case came to this court, expressly rested its

approbation of this course on the fact that the defendant did not even produce, or attempt to produce, *the witnesses*, and for that reason declined to pass, because unnecessary, on the validity of the order as to the books and papers, and that was the ruling which was before this court for review (p. 340).

Counsel also refers to Consolidated Rendering Company *vs.* Vermont, 207 U. S., 541. But in that case the order was limited to the production of such books and papers as showed the dealings of *certain named parties* between two *specified dates*, viz., January 1, 1904, and October, 1906 (p. 554). The court simply held that that order was not so general as to be an unreasonable search under the ruling in Hale *vs.* Henkel. That case, therefore, is manifestly no authority for the proceeding in the case at bar.

HENRY L. STONE,
WILLIAM A. COLSTON,
EDWARD S. JOUETT,
HELM BRUCE,
For Defendant in Error.

DECEMBER 9, 1914.

UNITED STATES, BY McREYNOLDS, ATTORNEY GENERAL, *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

ERROR TO AND APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 499. Argued January 5, 6, 1915.—Decided February 23, 1915.

No authority beyond that already conferred on the Interstate Commerce Commission by the Act to Regulate Commerce can be derived by that Commission from a resolution passed by only one branch of Congress; and so *held* that the powers of the Commission in making the investigation required by Senate Resolution No. 153, in regard to inspection of accounts and other papers, are limited to those conferred by the Act to Regulate Commerce and the amendments thereto.

Section 12 of the Act to Regulate Commerce does not make provision for inspection of accounts and correspondence of carriers authorized by the Commission; that feature was added by the Hepburn Act of June 29, 1906, amending § 20 of the Commerce Act.

The Hepburn Act, like other statutes, may be read in the light of the purpose it was intended to subserve, and the history of its origin and the report of the Interstate Commerce Commission submitted to Congress recommending the passage of the Act may be referred to.

As construed in the light of such report, and applying the rule of *noscitur a sociis*, § 20 of the Act to Regulate Commerce does not provide for the compulsory inspection of the correspondence of carriers, but is limited to accounts, including records, documents and memoranda.

Congress is not likely to enact a sweeping provision subjecting all correspondence of carriers to examination, attended with serious consequences in cases of withholding it, without using language adequate to that purpose.

The protection of confidential communications between attorney and client is well known and recognized as a matter of public policy.

The right of inspection of whatever accounts, records, documents and memoranda are included within § 20 of the Act to Regulate Commerce, as amended by the Hepburn Act, is not limited to those kept and made after the passage of the latter Act, but includes those kept and made prior thereto.

Quære, whether compulsory inspection of correspondence and other matters referred to in Senate Resolution No. 153 of Nov. 6, 1913, can be permitted within the constitutional rights of the carrier.

Where the Interstate Commerce Commission has applied for a writ of mandamus broader than the law permits, and no amendment was made narrowing the demand, but the petition was dismissed without prejudice, the proper practice is to affirm the order and not to reverse so as to grant the relief within the limits which the law allows; a new proceeding may be started for that purpose.

212 Fed. Rep. 486, affirmed.

THE facts, which involve the power of the Federal court to require the production of testimony, books and papers by a carrier under the provisions of the Anti-Trust Act in a proceeding started by the Interstate Commerce Commission pursuant to a resolution of the Senate of the United States, are stated in the opinion.

The Solicitor General, with whom *Mr. Theodor Megaarden* was on the brief, for the United States, and *Mr. Joseph W. Folk* for the Interstate Commerce Commission:

The scope and purpose of the pending investigation is within the purview of the Commerce Act and within the power and jurisdiction of the Commission.

Information of the relations existing between carriers is indispensable and necessary for the performance by the Commission of its proper duties.

The preservation of competition is one of the purposes of the Act, and its existence or non-existence bears directly upon the questions of discrimination, reasonableness of rates, and similar matters. *Gerke Brewing Co.* v. *Louis. & Nash. R. R.*, 5 I. C. C. 596, 606; *Int. Com. Comm.* v. *Balt. & Ohio R. R.*, 145 U. S. 263, 276.

It is also important to ascertain whether charges fixed by a carrier are just and reasonable within § 1 of the Act. *Int. Com. Comm.* v. *Chi. Gr. West. Ry.*, 209 U. S. 108, 119.

The matter of competition is also to be considered in applying the provisions of §§ 3 and 4 with reference to

undue or unreasonable preference to persons, etc., and the long and short haul clause. *Int. Com. Comm.* v. *Alabama Midland Ry.*, 168 U. S. 144, 164.

The subject is likewise material in connection with § 5 (pooling section) of the Act. *Central Yellow Pine Ass'n* v. *Ill. Cent. R. R.*, 10 I. C. C. 505; *East Tenn. &c. Ry.* v. *Int. Com. Comm.*, 99 Fed. Rep. 52, 61.

Whether a carrier is subject to the Act at all frequently depends upon the relation between it and other carriers. *Cincinnati &c. Ry.* v. *Int. Com. Comm.*, 162 U. S. 184.

The inquiry of the Commission is proper as a basis for legislative recommendations, for legal prosecutions, and for many other purposes. *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447, 474; *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 208.

The inquisitorial work of the Commission has been the basis of practically all congressional legislation affecting interstate carriers during the past 25 years. Where the persons and subjects under consideration are within the field of the Commission's lawful activities, the courts will not inquire as to the ultimate object of the investigation.

As to the plenary power of the Commission see *Int. Com. Comm.* v. *Brimson*, *supra.*; *Int. Com. Comm.* v. *Goodrich Transit Co.*, *supra.*; *Tex. & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438.

Even if the investigation should divulge violations of the Anti-Trust Act rather than of the Act to Regulate Commerce, that would not end the Commission's power. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 93.

In the course of this investigation the Commission was entitled to inspect the accounts, records, and memoranda, including correspondence, of the carrier and no peculiar privilege attends the so-called private and confidential correspondence between its officers and agents. *Grant* v. *United States*, 227 U. S. 74; *Wheeler* v. *United States*, 226 U. S. 478; *Wilson* v. *United States*, 221 U. S.

361. This is shown by the fact (otherwise unnecessary) that Congress makes it an offense for an examiner to divulge any information which may come to him during the course of an examination.

The privilege asserted as to the correspondence between the carrier and its attorneys is no warrant for refusing the writ as to other documents. The proposed examination is not an unreasonable search and seizure, nor does it violate any constitutional right of the carrier.

A corporation is not entitled to plead the immunity of the Fifth Amendment, and it is doubtful whether it can plead the immunity of the Fourth Amendment. *Hale* v. *Henkel*, 201 U. S. 43, 74; *Int. Com. Comm.* v. *Baird*, 194 U. S. 25. A corporation cannot restrict the production of its books and papers on the ground of self-crimination. *Wilson* v. *United States*, 221 U. S. 361, 382.

While an order calling for the production of such a large part of the records of a corporation that their absence will put a stop to the business of the company may constitute an unreasonable search and seizure, *Hale* v. *Henkel*, *supra*, this has no application to the case at bar, since the Commission seeks only to inspect the records of the defendant in error.

Having the power to regulate, Congress must also be held to have the power to determine what means are appropriate for carrying into effect its control. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 176.

The right to inspect accounts, records, and memoranda, including correspondence, is not limited to those only which have come into being since August 28, 1906, but extends to all those in the possession of the carrier whenever created. This does not make the Act retrospective in a legal sense. *Society* v. *Wheeler*, 2 Gall. 104; *Sturges* v. *Carter*, 114 U. S. 511.

The intent of the Act is to afford access to preëxisting documents. Even if, when so construed, it can properly

be called retrospective, it is none the less within the power of Congress.

There are no constitutional restrictions upon Congress in the matter of retrospective legislation as there are in some of the States. *Satterlee* v. *Matthewson*, 2 Pet. 380; *Sinking-Fund Cases*, 99 U. S. 700.

The main purpose of the Hepburn Act was to provide more adequate means for the enforcement of rights and duties declared to exist, and the Act impairs no existing rights or obligations, but, on the contrary, is a means of their effective enforcement.

Mr. Helm Bruce, with whom *Mr. Henry L. Stone*, *Mr. William A. Colston* and *Mr. Edward S. Jouett* were on the brief, for defendant in error and appellee:

The inquiry directed by the Commission was limited by its terms; and the examiners had no right to go beyond those limits.

The Commission had no authority to make the examination it sought to make. *Traders' Union* v. *Philadelphia R. R.*, 1 I. C. C. 374; *New York Produce Exch.* v. *Balt. & Ohio R. R.*, 7 I. C. C. 658; *Sprigg* v. *Balt. & Ohio R. R.*, 8 I. C. C. 456; *Haines* v. *Chi. & Rock Isl. R. R.*, 13 I. C. C. 214; *Tex. & Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 216, 221; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *Harriman* v. *Int Com. Comm.*, 211 U. S. 418.

There are differences in the purposes of the Act to Regulate Commerce and the Anti-Trust Act. *Cin., N. O. & T. P. R. R.* v. *Int. Com. Comm.*, 162 U. S. 197; *No. Sec. Co.* v. *United States*, 193 U. S. 331; *United States* v. *Freight Ass'n*, 166 U. S. 315; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 565.

The inquiry sought to be made by the Commission concerned conditions regulated by the Sherman Anti-Trust Act, but not by the Interstate Commerce Act.

he Commission's inquisitorial powers are not with-
limit. *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447,

ection 20 as amended by the Hepburn Act does not
the Commission access to the correspondence of the
ier. *Connecticut Life Ins. Co.* v. *Schaefer*, 94 U. S. 459;
kburn v. *Crawfords*, 3 Wall. 175; 4 Wigmore on Evid.,
90, p. 3193.

he rule of *noscitur a sociis* applies to the construction
his statute. *Virginia* v. *Tennessee*, 148 U. S. 503.

enal statutes should be strictly construed. *United*
es v. *Willberger*, 5 Wheat. 96.

tatutes should be construed, if possible, to avoid
onable doubts as to constitutionality. *Harriman* v.
Com. Comm., 211 U. S. 422.

he Hepburn Amendment to § 20 of the Commerce
does not give the Commission access to records ex-
g prior to the passage of that Act.

he search of defendant's papers sought by the Com-
ion's examiners would, if permitted, be an unreason-
search, contrary to the Federal Constitution; to the
ection of which amendment corporations are entitled.
v. *Henkel*, 201 U. S. 43, 75; *In re Pacific Ry. Comm.*,
ed. Rep. 241, 263.

MR. JUSTICE DAY delivered the opinion of the court.

his is an appeal from and writ of error to the District
rt of the United States for the Western District of
tucky, refusing a writ of mandamus which the United
es undertook to obtain under authority of § 20 of the
to Regulate Commerce, as amended, June 29, 1906,
591, 34 Stat. 584, 594, 595. In view of the character
n action in mandamus we are of opinion that the review
writ of error. *Ins. Co.* v. *Wheelwright*, 7 Wheat. 534;
monwealth of Kentucky v. *Dennison*, 24 How. 66, 97;

High on Extraordinary Legal Remedies, §§ 6, 557. The appeal is therefore dismissed.

The petition sets forth the authority conferred upon the Commission by § 20 of the Act, and also § 12, and embodies a copy of a resolution passed by the Senate of the United States which is given in the margin.[1] It further

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[1] "RESOLUTION.

"Resolved, That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable—

"First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

"Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga & Saint Louis Railway;

"Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

"Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

"Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad, and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad, or any of its subsidiaries, or holding companies;

"Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

"Seventh. Any other fact or facts showing or tending to show, the

tates that for the purpose of enabling the Commission to erform its duties, it appointed two special agents and uly authorized them to inspect and examine the accounts, ecords and memoranda of the defendant Railway Company; that on February 4, 1914, one of said agents demanded of the Vice President of the defendant, the officer

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rther relations between the Louisville and Nashville Railroad, the ashville and Decatur Railroad, and the Lewisburg and Northern ailroad, and any fact or facts showing, or tending to show, whether ese relations restrict competition and maintain and fix rates;

"Eighth. Any fact or facts showing, or tending to show (a) the relaons between the Louisville and Nashville Railroad, the Nashville, attanooga and Saint Louis Railway, the Tennessee Midland Railad, the Tennessee, Paducah and Alabama Railroad, and any other ilroads that have been purchased or leased by either or both of said lroad companies, and whether such relations restrict competition d maintain and fix rates; and, (b) whether the lease of the Western d Atlantic Railroad by the Nashville, Chattanooga and Saint Louis ilway from the State of Georgia, and the arrangement made between e Louisville and Nashville and the Nashville, Chattanooga, and Saint uis Railway by which the former uses the tracks of the said Western d Atlantic Railway restrict competition, restrain trade, and deterne and fix rates;

'Ninth. Any fact or facts showing, or tending to show, whether the nership of the Louisville and Nashville Railroad and the Nashville, attanooga and Saint Louis Railway of any railroad terminals or minal companies, steamboats and steamboat lines upon the Cumberd and Tennessee Rivers, and any dock or dock yards at Pensacola, w Orleans, Mobile, or other seaport establishes a monopoly and reicts competition and determines and fixes rates;

'Tenth. Any fact or facts showing, or tending to show, whether an eement or arrangement has been entered into between the Louisville l Nashville and other railroad companies for the purpose of prevent- competition from entering into any of the territory served by the uisville and Nashville Railroad, in consideration of the Louisville l Nashville Railroad agreeing not to enter into certain other terri-y, or in consideration of any other agreement or arrangement;

'Eleventh. What amount of stock, if any, the Atlantic Coast Line mpany or Atlantic Coast Holding Company owns in the Louisville l Nashville Railroad, and in the Atlantic Coast Line, and whether

in charge and control of the accounts, records and memoranda of the Company, and to and of other officers, access to and opportunity to examine the accounts, records and memoranda kept by the defendant prior to August 28, 1906, [The Hepburn Act took effect August 29, 1906] and that the same was refused by the officers of the Company; that on February 4, 1914, a demand was made for an opportunity to examine the accounts, records and memoranda of the defendant on and subsequent to August 28, 1906, which was refused; and a writ of mandamus was asked against the company, requiring it to give access to its accounts, records and memoranda, and its correspondence and copies of correspondence, and indexes thereto, and to afford opportunity to examine the same to the Commission and its agents and examiners, and to give such access to and opportunity to examine the said accounts, records and memoranda made and kept by and for said

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the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

"Twelfth. What amount, if any, the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

"Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials, or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads."

efendant both before, on, and subsequent to August 28, 906, including correspondence, copies of correspondence, nd indexes thereto, and other indexes to said accounts, ecords, and memoranda.

To this petition the defendant answered, setting out iat it did, prior to the beginning of the suit, give the xaminers access to the correspondence other than priv-eged communications, and that after this suit it did refuse nd does now refuse to give to said Commission or to said gent access to or opportunity to examine correspondence ceived by it before, on, or subsequent to August 28, 1906, copies of correspondence sent out by defendant before, or subsequent to that date, or the indexes kept with spect to said outgoing and incoming correspondence by efendant (except correspondence as to passes issued since nuary 1, 1911), and the defendant set up that its corre-ondence contains private communications between its rious officers and agents regarding various matters iich did not in any way pertain to the provisions of the t to Regulate Commerce, nor to any act of Congress, the ovisions of which it is made the duty of the Interstate mmerce Commission to enforce, and avers that said rrespondence contains communications of a private and nfidential nature between the president of the railway mpany and the heads of the various departments, rela-e to its internal affairs, to its proposed constructions d extensions in the future, to its policies with competing d rival roads, to its relations with labor organizations resented in its operating department, and to a variety other subjects of a private and confidential nature, and t do not relate to the provisions of the Act to Regu-e Commerce and acts amendatory thereto, or to any er act of Congress as to the enforcement of which any y has been imposed upon the Interstate Commerce nmission, and that said correspondence also contains fidential, private, and privileged communications be-

tween defendant and its attorneys. The answer further sets up that under the provisions of § 20 of the Commerce Act a uniform system of accounting has been prescribed by the Commission, and that defendant has fully complied with all such requirements, and that the Commission's examiners have full and complete access to the same; that if the Act to Regulate Commerce can be construed as giving the said Commission or its examiners a right of access to, and the right to examine or inspect at will, any or all accounts, records, and memoranda, and all correspondence received, and all copies of correspondence sent out by the defendant or its officials in the manner and as set out and claimed in the petition, then the exercise of such alleged right in this respect will amount to and operate as an unreasonable search and seizure of the private papers of the defendant, in violation of the Fourth Amendment to the Constitution of the United States.

The answer further sets out a copy of the Senate Resolution, and the order of the Interstate Commerce Commission ordering the investigation and inquiry concerning the matters and things set forth in the resolution, and providing that the proceeding be set for hearing at such times and places, and that such persons be required to appear and testify, or to produce books, documents and papers, as the Commission may direct, and that a copy be served upon certain railways, including the defendant. The answer also sets up that the subject-matter of the first twelve paragraphs of the Senate Resolution was not within the authority of the Interstate Commerce Commission, and avers that as to the subject-matter of the thirteenth paragraph, which relates to free passes, since January 1, 1911, defendant permitted the Commission and its examiners and agents, on their request, to have access to and to examine and inspect all accounts, records and memoranda, relating to such passes, whether interstate or intrastate, and also all correspondence relating to such passes (al-

though defendant claims that the Commission had no legal right to examine any of said correspondence, nor to examine any intrastate passes, or any accounts, records, and memoranda pertaining thereto).

Motion was made for the writ of mandamus to issue as prayed for in the petition, certain testimony was taken, showing the demand of the agent and the refusal of the Company. Upon hearing the motion was denied.

The testimony shows that the refusal withheld from the inspection of the agents making the demand all accounts, records and memoranda kept prior to August 28, 1906; all accounts, records and memoranda subsequent to that date except such as to which the form had been subsequently prescribed by the Commission; all correspondence and the indexes thereto upon any subject other than the issue of passes subsequent to January 1, 1911, and all certificates of destruction, if any, relating to papers antedating August 28, 1906.

The discussion in this case has taken a wide range, and much has been said of the constitutional rights of the defendant and the authority of the Commission to carry out the purpose of the Interstate Commerce Act, and to make investigations which shall be the basis of the discharge of duties imposed upon it by the law. But, as we view the case, the real questions may be determined by a consideration of certain provisions of the Act to Regulate Commerce. We may at the beginning put aside any question of authority derivable from the resolution passed by the Senate. The resolution was passed by only one branch of the legislative body and it is not contended by the Government or the Commission that any authority is derivable from it.

To authorize the Government to demand the writ of mandamus in this case two sections of the Interstate Commerce Act are invoked,—twelve and twenty. It is enough to say of § 12 that the record discloses that the proceedings

and the demands for inspection in this case were not conducted under its authority. See *Harriman Case*, 211 U. S. 407.

Section 12 deals with the production of evidence in certain cases; it does not make provision for inspection by examiners duly authorized by the Commission. That feature of the law was added by the amendment to § 20, of June 29, 1906.

The substantial question in the case is: Was the right of inspection of the accounts, records and memoranda of the defendant in the manner attempted by the agents who represented the Commission in this respect, authorized by § 20 of the Act, as the same is amended by the Hepburn Act of June, 1906?

That section as amended provides in part:

"The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such

rier, receiver, or trustee shall forfeit to the United
tes the sum of five hundred dollars for each such offense
l for each and every day of the continuance of such
ense, such forfeitures to be recoverable in the same
nner as other forfeitures provided for in this act.

'Any person who shall willfully make any false entry
the accounts of any book of accounts or in any record
memoranda kept by a carrier, or who shall willfully
troy, mutilate, alter, or by any other means or device
ify the record of any such account, record, or mem-
nda, or who shall willfully neglect or fail to make full,
e, and correct entries in such accounts, records, or
moranda of all facts and transactions appertaining to
carrier's business, or shall keep any other accounts,
ords, or memoranda than those prescribed or approved
the Commission, shall be deemed guilty of a misde-
anor and shall be subject, upon conviction in any court
the United States of competent jurisdiction, to a fine
not less than one thousand dollars nor more than five
usand dollars, or imprisonment for a term not less than
e year nor more than three years, or both such fine and
prisonment.

'Any examiner who divulges any fact or information
ich may come to his knowledge during the course of
h examination, except in so far as he may be directed
the Commission or by a court or judge thereof, shall
subject, upon conviction in any court of the United
ates of competent jurisdiction, to a fine of not more
an five thousand dollars or imprisonment for a term not
eeding two years, or both."

This section, it will be observed, gives authority to the
mmission to employ special agents or examiners, who
ll have authority under the order of the Commission
inspect and examine any and all accounts, records and
moranda kept by such carriers. The copy of the au-
rity issued by the Commission to the special agent or

examiner who made the demand for inspection in this case shows that he was clothed with authority to examine any and all "accounts, records and memoranda" kept by carriers subject to the Act to Regulate Commerce. The language here used, taken from § 20, shows that the Commission acted under authority of that section, and the examiner was thereby authorized to make the demand, the refusal to comply with which was the basis for the petition for the writ of mandamus in this case.

This part of the amended section, as the report of the Interstate Commerce Commission, 1905, page 11 shows, was framed by the Commission and became a part of the law upon its recommendation. The appendix to the report (p. 182) shows the amendment in the form in which it became a law. In commending the passage of such an act, the Commission, in its report to Congress, said:

"Examination of Books of Account."

"An efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe a form in which books of account shall be kept by railways, with the right on the part of the Commission to examine such books at any and all times through expert accountants. This recommendation has been urged upon the attention of the Congress in previous reports, and we earnestly renew it at this time. Probably no one thing would go further than this toward the detection and punishment of rebates and kindred wrongdoing.

"We have also called attention to the fact that certain carriers now refuse to make the statistical returns required by the Commission. For example, railways are required, among other things, to indicate what permanent improvements have been charged to operating expenses. Without an answer to this question, it is impossible to determine to what extent gross earnings have been used in improving the property and the actual cost of operation proper.

Admitting the right of a railroad company to use its money as it sees fit, it is certainly proper that the government should know what use is made of it, for the purpose of determining whether its rates and charges imposed are legitimate. Certain important railways decline to furnish this information at all and others furnish it in a very imperfect and unsatisfactory manner.

"We have also recently required carriers to furnish statistics showing the rate per ton-mile actually received for the movement of certain kinds of carload traffic, but this requirement has not been generally complied with."

Responding to this recommendation, and acting upon the bill in the form proposed by the Commission, it was adopted as an amendment and became Amended § 20 of the Act to Regulate Commerce.

Of course this Act, like other acts, may be read in the light of the purpose it was intended to subserve and the history of its origin. We find then that in this section Congress has authorized the Commission to prescribe the forms of accounts, records, and memoranda, which shall include accounts, records and memoranda of the movements of traffic, as well as the receipts and expenditures of money, to which accounts, records and memoranda the Commission is given access at all times. The railroads are not allowed to keep any other than those prescribed by the Commission. The Commission is empowered to appoint agents or examiners with authority to inspect and examine such accounts, records and memoranda, and provision is made, penalizing the failure to comply with the orders of the Commission concerning such accounts, records and memoranda, or the falsification thereof, or the willful destruction or mutilation thereof, or the failure to make full, true and correct entries in such accounts, records and memoranda of all facts and transactions pertaining to the carrier's business, or keeping any other accounts, records and memoranda.

Reading these provisions of the Act, there is nothing to suggest that they were intended to include correspondence relative to the railroad's business. In recommending the passage of the Act, the Commission did not suggest that it was essential to its purpose to have an inspection of the correspondence of the railroad. And, with its expert consideration of the questions involved and having clearly in mind the authority it was intended to secure, it can scarcely be supposed that the Commission would have confined its proposed amendment to the carefully chosen words "accounts, records or memoranda," and would have omitted the word "correspondence," if it had intended to include the latter. If we apply the rule of construction,—*noscitur a sociis*,—we find that all the provisions of the Act as to the inspection of accounts have relation to such as are kept in the system of bookkeeping to be prescribed by the Commission. It would be a great stretch of the meaning of the term as here used, to make "memoranda" include correspondence. The "records" of a corporation import the transcript of its charter and by-laws, the minutes of its meetings—the books containing the accounts of its official doings and the written evidence of its contracts and business transactions. Certainly it was not intended that the Commission should prescribe the forms of correspondence, although it was given the power to prescribe the forms of all accounts, records and memoranda subject to the provisions of the Act.

It is urged that the amendment to § 20 of February 25, 1909, adding a proviso to paragraph 7, shows the intention of Congress to provide for accounts, records and memoranda, including more than those as to which the form may be prescribed by the Commission, and in the word "document" making this section broad enough to include correspondence. The language of this proviso is as follows (35 Stat. 648, c. 193):

"Any person who shall willfully make any false entry

in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: Provided, that the commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved."

It may be that the section is broad enough, particularly when read in the light of this proviso, to authorize an inspection of accounts, records and memoranda for which no form has been prescribed by the Commission, but we do not find in this proviso anything to indicate that Congress in the original act or the amendment intended to provide for the compulsory inspection of correspondence.

There is nothing from the beginning to the end of the section to indicate that Congress had in mind that it was making any provisions concerning the correspondence received or sent by the railroad companies. The primary object to be accomplished was to establish a uniform system of accounting and bookkeeping, and to have an inspection thereof. If it intended to permit the Commission

to authorize examiners to seize and examine all correspondence of every nature, Congress would have used language adequate to that purpose. A sweeping provision of that nature, attended with such consequences, would not be likely to have been enacted without probable exceptions as to some lines of correspondence required to be kept open and subject to inspection upon demand of the agents of the Government.

In the brief filed on behalf of the United States, it is frankly admitted that there is much force in the objection that Congress did not intend in this grant of authority to include the confidential correspondence of the railroad companies between itself and its counsel, and it is admitted that in this respect the demand of the agent of the Commission may be too broad. The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance. *Connecticut Mutual Life Insurance Co.* v. *Schaefer*, 94 U. S. 457, 458. And see the comments of this court in *Blackburn* v. *Crawfords*, 3 Wall. 175, 192.

How far such a demand as embodied in this petition can be permitted within the constitutional rights set up by the defendant, we do not need to consider, as we do not think that the section of the act of Congress under which the demand was made authorizes the compulsory submission of the correspondence of the company to inspection. It is true that correspondence may contain a record, and it may be the only record of business transactions, but that fact does not authorize a judicial interpretation of this statute which shall include a right to inspection which Congress did not intend to authorize.

The court below held that the right to demand inspection of documents before August 29, 1906, the date when e Hepburn Act went into effect, was of such a doubtful aracter that the writ ought not to issue. We think the ht of inspection and examination given by the Interte Commerce Act by the amendment to § 20, was not ended to be limited to such accounts, records, and emoranda only as were made after the passage of the Act, t is intended to permit an examination of all such acunts, records, and memoranda, for the purpose of carry- out the provisions of the Act. It is not contended that ngress might not do this within its constitutional auority, and the argument is that it had no such right in ntemplation and did not intend to authorize it; but think it is clear from the terms of the act, read in the ht of its purpose, that Congress did not intend to draw e line of inspection at preëxisting accounts, records, and emoranda.

The Government argues that if it be held that the prayer the writ of mandamus and the accompanying motion re too broad in requiring the production of confidential mmunications between attorney and client which were ntained in this correspondence, nevertheless the court uld have issued its writ of mandamus in so far as the ator showed it was entitled thereto, and the case of *est Virginia Northern R. R.* v. *United States*, 134 Fed. p. 198, 203, is cited to the effect that such practice permissible. The case shows, however, an amendment s permitted so as to make the writ conform to the hts which could be properly granted. And that course ght have been pursued in this case.

Whether the Commission would desire an inspection the accounts, records and memoranda as we have nstrued the terms of the Act, without the right to exine the correspondence we are not advised. As the tition in this case was dismissed by the court below

without prejudice, and a new proceeding my be staarted, asking for such inspection as the law allows, we think the order of the court refusing to grant the writ of mandamus in the broad terms prayed for in the petition and the motion for the writ should not be reversed to permit a grant of relief within the limits which the law allows as we interpret it.

It follows that the judgment of the District Court, refusing the writ and dismissing the petition should be

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.